United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1007

To be argued by
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

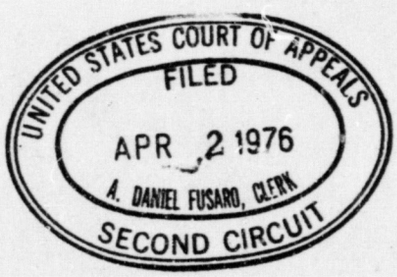
GERALD DEVINS,

Appellant.

Docket No. 76-1007

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether trial counsel's divided loyalties resulting in lack of preparation and premature termination of the defense case deprived appellant of his right to the effective assistance of counsel.

2. Whether the combination of the prosecutor's misconduct and the District Court's erroneous rulings during the proceedings deprived appellant of a fair trial.

3. Whether the District Court's refusal to compel the testimony of the co-defendant King who, after pleading guilty and being severed from the case, was subpoenaed as a witness by appellant deprived appellant of due process.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi) entered on November 13, 1975, after a jury trial, convicting appellant Gerald Devins of one count of conspiracy to defraud the United States Small Business Administration (SBA), in violation of 18 U.S.C. §371; two counts of filing false statements with the SBA, in violation of 18 U.S.C. §§1001 and 2, and one count of fradulently overvaluing a security for the purpose of obtaining a loan from the SBA, in violation of 15 U.S.C. §645(a). Appellant was sentenced to the custody of the Attorney General for a period of fifteen months on the first three counts and six months on the fourth count, with a two year term of probation to follow, all sentences to run concurrently.

Appellant was permitted to remain free on a $10,000 personal recognizance bond pending appeal. This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Gerald Devins was indicted,[1] along with Claude Hill and Max King, on November 8, 1974, in the Southern District of New York, on one count of conspiring among themselves and with others to defraud the U.S. Small Business Administration (SBA) by making false statements on an SBA loan application and by falsely overvaluing a security for the purpose of obtaining a $50,000 SBA loan, in violation of 18 U.S.C. §371 (Count One). In addition to the conspiracy count, appellant was indicted with Claude Hill on a substantive count of filing a knowingly false statement with SBA, in violation of 18 U.S.C. §§1001 and 2 (Count Three). Finally, appellant alone was indicted in two additional substantive counts -- causing an SBA loan application to be filed containing knowingly false information, in violation of 18 U.S.C. §§1001 and 2 (Count Two), and falsely overvaluing a security in the abovementioned SBA loan application, in violation of 15 U.S.C. §654(a) (Count Four).

Appellant Devins, Hill, and King were tried together before The Honorable Lee P. Gagliardi and a jury, the proceedings commencing on April 7, 1975. Defendant King pleaded guilty during trial to a superseding misdemeanor information charging him with failing to file a corporate tax return, and was severed

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[1] The indictment (74 Cr. 1052) is B to appellant's separate appendix.

from the case.[2] On April 24, 1975, after a three-week trial, appellant, represented by Bernard J. Coven, Esq., was convicted on all four counts, while Hill was acquitted of the two counts against him.[3]

Following the trial, on November 3, 5, and 6, 1975, a hearing was held before Judge Gagliardi on appellant's motion to set aside the verdict and for a new trial based on claims of newly discovered evidence, inadequate assistance of counsel, and the prosecution's failure to disclose Brady and 3500 material.[4] The motion was denied by Judge Gagliardi on November 11, 1975, in an oral opinion.[5]

On November 13, 1975, Judge Gagliardi sentenced appellant on Counts One, Two, and Three to the custody of the Attorney General for a period of fifteen months, and on Count Four for a period of six months, with a two-year term of probation to

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[2] The instant indictment against King was nolle prosequed on August 26, 1975 (Document #7 to the record on appeal).

[3] Hill and King were represented by the same counsel, Jeffrey Hoffman, Esq.

[4] Appellant's motion and affidavit are Document #12 to the record on appeal. At the hearing, appellant was represented by David Brodsky, Esq.

[5] The Court's oral opinion is D to appellant's separate appendix.

follow completion of the prison sentence, all sentences to run concurrently.[6]

A. The Trial

The Government's theory of the case was that appellant and Hill (and later King, who took Hill's place), together with Robert B. Grosvalet, Sylvia Kristof, Guy Runyon, Lawrence Grossberg, and Leonard Kirtman,[7] conspired together to defraud the SBA by obtaining a $50,000 Economic Opportunity loan through submission of an SBA loan application and supporting documents containing knowingly false statements. According to the Government's theory,[8] in June 1973 appellant, Grossberg, and Kirtman persuaded Grosvalet, a 28-year old Vietnam veteran whom the prosecutor classified as someone who "falls somewhere in between" a dupe and a conspirator (635, 1511, 2116[9]), to become

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[6] The minutes of the sentencing proceeding are Document #20 to the supplemental record on appeal. Based on a stipulation and sentencing memoranda submitted by both sides, the court was permitted to take into account the facts underlying two other outstanding indictments against appellant, 74 Cr. 1051 and 1055, in imposing sentence on the instant indictment (see Document #20, p.33).

[7] Although Grosvalet, Kristof, Runyon, Grossberg, and Kirtman were not named in the indictment as co-conspirators, they were named as such by the Government in response to appellant's request for a bill of particulars.

[8] The most concise statements of the Government's theory are found in its opening (11-31) and closing (2099-2159) remarks.

[9] Numerals in parentheses refer to pages of the trial transcript.

a figurehead president of a film distributing corporation named R.B. Grosvalet Film Distributors, Inc. (RBG), with his 20-year old girlfriend, Kristof, as corporate secretary. Grosvalet obtained loan forms from the SBA and took them to appellant's office in Island Park, Long Island, where appellant and one Nicholas Siviglia prepared the forms for submission to the SBA. The forms contained, among other things, information to the effect that as of May 31, 1973, RBG was a corporation with total assets of $22,500, and had collateral for the loan in the form of inventory worth $47,500, all of which the Government contended was false. Following appellant's instructions, Grosvalet submitted the forms to the SBA in June or July of 1973. Subsequently, on or about August 1, 1973, a contract was entered into at appellant's office whereby a nonexistent corporation named National TelePix, Inc. (NTP), whose president was then Hill and one of whose addresses was the same as appellant's Island Park office, agreed to sell to RBG distribution rights to certain films called the Wally Western series for $30,000, which Grosvalet was to pay NTP from the proceeds of the SBA loan. A copy of that contract, signed by Hill and Grosvalet, together with a later addendum providing that if RBG did not do $60,000 worth of business within six months, $25,000 of the SBA proceeds would be returned to SBA, was submitted to the agency. Based on the documents submitted and representations made by appellant in September 1973 during a meeting in his office with a retired executive acting on SBA's behalf to evaluate the loan applica-

tion, at which meeting Grosvalet and Runyon were also present, a $50,000 loan was secured by RBG. At the loan closing in May 1974, attended by Grosvalet, Kristof, and King, who had replaced Hill as president of NTP, Grosvalet gave a $30,000 check to King. When in the following weeks Grosvalet failed to receive the promised films to distribute, he complained to the New York State Attorney General's office which, in turn, referred him to the United States Attorney's office, resulting in the instant indictment. Finally, it was part of the Government's theory that while appellant actually received very little money from the SBA loan proceeds, he had intended to make use of the proceeds, along with Hill, to acquire a public corporation, in essence a "scheme ... to get an interest-free $25,000 loan for six months" (24).

It was appellant's theory of defense, articulated most precisely out of the jury's presence (1690-1701),[10] that if a conspiracy existed, it actually involved Siviglia, Hill, King, and a man named Elvin Feltner, with whom Hill and King were associated, and that appellant was uninvolved and stood to gain

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[10] Appellant's defense theory was never fully elaborated to the jury primarily because, as contended on this appeal, appellant was denied effective assistance of counsel (Point , infra) and could not call either of his initial two co-defendants (Point III, infra).

nothing by it.[11] It was part of appellant's theory that it was actually Siviglia who prepared the loan application for Grosvalet.

Hill's defense was also based on similar uninvolvement in and lack of knowledge of any conspiracy. It was part of his defense theory that he had signed the NTP contract with RBG not knowing that NTP was actually unincorporated and never having read the contract appellant had given him to sign.

2. The Government's Case

The Government's primary witness was Grosvalet, an unindicted co-conspirator. In early June 1973, Grosvalet, his girlfriend, Kristof, and some other friends were dubbing breathing effects on a pornographic film at a studio owned by Leonard Kirtman when Lawrence Grossberg appeared at the door of an interior office and asked "if anybody here was a veteran" (189-191).[12] Grosvalet, who had been discharged from the Army

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[11] Throughout the trial appellant's defense counsel continually sought a severance from Hill and King so that he could call them as witnesses. The severance, however, was never granted (132, 210-214, 579, 1508, 1690-1705, 1856).

[12] Grossberg's inquiry was corroborated by two other Government witnesses -- Kristof (991) and Karen Klein (180-182), a friend of Grosvalet's who was also present to dub the "breathing" on the pornographic film, although Grossberg, testifying as a witness for appellant, did not recall making such a statement, nor did he believe he ever would have asked such a question (1635-1638).

in 1969 with a fifty per cent disability due to a nervous condition[13] and who knew Grossberg as Kristof's employer at a company called Martin Audio (534), responded that he was a veteran and was taken into the office by Grossberg, who closed the office door (182, 190-191).

Inside, Grosvalet was introduced to Kirtman and appellant and was asked by Grossberg if he wanted to own his own business (191). Appellant then explained to Grosvalet that Grosvalet could get a small business loan as a veteran and could go into business selling or distributing films (192-193). Grosvalet would be president of the company and would receive a $9,000 salary, while appellant, Grossberg, and Kirtman would be one-third partners (193, 221). Appellant further explained that Grosvalet would first have to apply for a loan from two banks and be turned down before he could be eligible for an SBA loan (194). After applying at two banks and being rejected, Grosvalet secured SBA loan application forms and brought them back to appellant at appellant's office at 4584 Austin Boulevard, Island Park, Long Island (194-195, 198-199). This trip to appellant's office occurred approximately one week after the initial meeting at Kirtman's studio in early June 1973 (200). During this second meeting Grosvalet wrote down a personal history on a piece of paper and gave it to appellant. Although

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[13] Although receiving an honorable discharge, Grosvalet had been court martialled while in the Army for a marijuana offense (185).

Grosvalet also claimed to have seen appellant fill out duplicate copies of the forms, which were ultimately submitted to SBA, or recognized appellant's handwriting on the duplicates, this assertion was later proven false.[14]

A few days later, at appellant's instruction, Grosvalet returned to appellant's office to pick up the completed SBA

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[14] The prosecutor introduced at trial duplicate handwritten copies of almost all the final, typewritten forms submitted to SBA (Government Exhibits #1A, #2A, #3A, #5A, #6A, #8A, #9A, found as Documents #32-38 of the supplemental record on appeal), of which Grosvalet had retained copies (531, 545). It was on the basis of Grosvalet's testimony, oftentimes unequivocal, that he had either seen appellant make out the handwritten duplicate forms or recognized appellant's handwriting on those forms, that some of the duplicate forms were admitted into evidence over appellant's objection (see, e.g., 202, 231, 234, 247-247, 287-288, 546-549, 552-553, 682). Appellant's counsel repeatedly maintained that the prosecutor was pursuing knowingly perjured testimony in that he knew that those handwritten documents were not in appellant's handwriting, an allegation the prosecutor termed "frivolous" (see, e.g., 301-305, 1323-1331). The prosecutor also permitted Grosvalet's girlfriend, Kristof, to testify that she too saw appellant make out some of the duplicate handwritten SBA forms (996, 1013, 1121, 1122). The prosecutor, moreover, refused to turn over to the defense his handwritten notes of his interviews with Grosvalet, which appellant maintained were "3500" material but which the trial court held were not (e.g., 423-425). It was subsequently disclosed, however, through the testimony of Nicholas Siviglia, another prosecution witness, that the handwriting was Siviglia's, and not appellant's, which appeared on the duplicate SBA forms (1158-1166, 1233). While denying appellant's motion for a mistrial based on the use of perjured testimony, the court indicated that it would leave determination of the issue for a post-trial hearing (1331). In his summation, the prosecutor attempted to explain away Grosvalet's testimony concerning appellant's handwriting by stating that Grosvalet had been mistaken, but "at no time during his testimony did he actually say, yes, this is the document I saw" (2120-2121). As indicated above, however, the prosecutor's assertion was incorrect.

forms (204-205). Grosvalet took the completed forms to SBA, where he was told that there were still a few forms missing (205). When Grosvalet informed appellant of that fact, appellant replied he would "take care of it" (206). These forms, too, were later picked up by Grosvalet and delivered to SBA.

The principal loan application documents, admitted into evidence as Government Exhibits #1-8 and #10,[15] were all identified by Grosvalet as documents he picked up at appellant's office and took to SBA at 26 Federal Plaza, Manhattan, in late June 1973 (218-284). At the time Grosvalet picked up the documents, he had a conversation with appellant concerning the meaning of the forms and the figures they contained (219-221). For example, when Grosvalet asked appellant how he had acquired $47,500 worth of inventory mentioned in the loan application form (Government Exhibit #1), appellant told him that was the value of certain films (the Wally Western series and another film) Grosvalet was to receive (221-223). The loan application (Government Exhibit #1), dated as of June 20, 1973, stated that the applicant, RBG Film Distributors, Inc., possessed film inventory valued at $47,500, although Grosvalet denied at trial

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[15] The principal SBA loan application documents, which it was stipulated were relied upon by the SBA in processing the loan application (1350), are found as Documents #29-31 to the supplemental record on appeal.

that he had a corporation as of that date or that he possessed $47,500 worth of film (239-240).[16]

Similarly, the Personal Financial Statement (Government Exhibit #2) stated that as of May 31, 1973, Grosvalet owned stock in RBG valued at $15,000, although at trial Grosvalet denied he owned any stock worth $15,000 as of May 31 (241-242). According to Grosvalet's trial testimony, most of the remaining documents he had filed with SBA (Government Exhibits #3-8) also contained false or misleading information (243-284). Grosvalet claimed, however, that while he had read the documents before filing them, the answers to his questions concerning them led him to believe that the papers were "correct" at the time (511-514). Moreover, Grosvalet stated at trial that he had not intended to defraud the SBA, nor had anyone else involved suggested that that be done (443-444).

In late June or July 1973, Grosvalet received a telephone call at appellant's office[17] from a Dunn and Bradstreet representative. When Grosvalet was unable to understand or answer

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[16] It was stipulated that RBG was incorporated in New York in July 1973 by Ronald Farr, Esq., who filed the incorporation application after receiving a call from Grosvalet or Siviglia on July 13, 1973 (1341-1344).

[17] RBG's office was located at the same address as appellant's office in Island Park, Long Island, pursuant to a lease entered into between Grosvalet and appellant on September 1, 1973 (Government Exhibit #32, Document #39 to the supplemental record on appeal).

the questions concerning his financial status, he asked appellant to pick up the phone. Appellant did so, introduced himself as "Hank Meyers," Grosvalet's accountant, and proceeded to answer questions concerning Grosvalet's finances (342-347).

On August 1, 1973, Grosvalet met Hill for the first time when Siviglia drove them to appellant's office for the purpose of signing a contract whereby NTP[18] agreed to provide RBG with

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[18] The history of NTP was elicited through the testimony of Richard Shields, the president of a company called American Diversified Industries (ADI) and a witness for the Government (1389-1497). ADI was originally known as NTP, but its name was changed to ADI in 1968. At the same time, NTP was re-incorporated as a subsidiary of ADI, but did not engage in any business. Hill was president of the re-incorporated NTP and an officer and director of the parent company, ADI, whose chairman was Elvin Feltner (1391-1395). In February 1972, Feltner suggested to Shields that he meet with appellant for the purpose of determining whether appellant could raise funds for ADI, which was cash poor. At this time, Shields changed the name of NTP to Prestige Industries, a name suggested by appellant, and incorporated Prestige in Delaware during February 1972 (1397-1399). As a result, NTP temporarily ceased to exist as a corporate entity (1403). In July 1974, Max King, who had replaced Hill, re-incorporated the name NTP in Delaware (Government Exhibit #26 and #27, Documents #40-41 to the supplemental record on appeal). Shields was sure, however, that NTP never had an address at appellant's office building in Island Park (1405), even though a letter dated June 15, 1973, submitted to SBA indicating the contractual arrangement between NTP and RBG (Government Exhibit #10, Document #31 to the supplemental record on appeal), indicated the Island Park address as NTP's national headquarters. The letter was over Hill's signature, but it was agreed at trial that the signature was not actually Hill's.

a laboratory access letter[19] enabling RBG to distribute motion picture films called the Wally Western series (721-722, 810).[20] Although Hill signed the contract, Grosvalet was not sure of what some of the provisions meant and, in appellant's presence, asked Hill about them. Grosvalet, not wanting to sign the contract without first consulting a lawyer, took it with him. Later, however, without consulting a lawyer, he signed it and dropped it off either at appellant's office or at the Manhattan office of Trans-America Film Corporation, of which Hill was also president and where Hill had an office. On about August 10, 1973, Grosvalet picked up the contract at the Trans-America office and took it to the SBA at 26 Federal Plaza (326-341). Some time in September 1973, at the Trans-America office and in Hill's presence, Grosvalet signed an addendum to the contract[21] which already bore Hill's signature. The addendum too

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[19] Louis Wolfe, the supervisor of a film laboratory which processed the prints of the Wally Western series, testified for for the Government and explained that a laboratory access letter from a company owning film prints stored at his laboratory permitted another party to make use of the prints for distribution purposes (831-834). He testified that the Wally Western series, originally owned by NTP, was transferred to ADI, which was now the registered owner of the series (834). However, he had never received any laboratory access letter from ADI permitting RBG to make use of the film prints (834-837).

[20] The contract between NTP and RBG (Government Exhibit #11) is found as Document #42 to the supplemental record on appeal.

[21] The addendum to the contract (Government Exhibit #11A) is Document #43 to the supplementary record on appeal. It provided that if RBG terminated the distribution contract after a six-month period, $25,000 would be refunded by NTP to RBG and the SBA.

was taken by Grosvalet to the SBA office (341-342).

In October 1973 Grosvalet, appellant, and Guy Runyon participated in a meeting held at appellant's office with Mr. Singer, a retired executive who worked for an organization called S.C.O.R.E., which helped the SBA evaluate loan applications and provided managerial assistance and advice where needed. Singer asked questions concerning RBG, but appellant was the one who answered almost all of them (350-354).[22]

In March 1974, as a result of an argument with Grossberg over the length of time it was taking to get RBG operational, Grosvalet called an SBA representative named Schulman to cancel the loan application.[23] Upon later telling appellant of his action, Grosvalet was told by appellant that "we can get

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[22]Grosvalet's testimony concerning the meeting with Singer, the S.C.O.R.E. representative, was corroborated by Singer himself. Singer testified that at the meeting, which was actually held on September 3, 1973, appellant answered almost all his questions concerning RBG's operations (853-865). Singer's report and evaluations of RBG and Grosvalet, based on the information supplied by appellant, were later submitted to the SBA and introduced at trial (Government Exhibit #18, Document #44 to the supplemental record on appeal.

[23]Bertram Schulman, an attorney working for SBA, confirmed that Grosvalet called him in April 1974 to cancel the loan application, but subsequently called back to have it reinstated (1297-1319).

rid of Mr. Grossberg" and to call Schulman back and tell him that he had only had a fight with his girlfriend (374-378). When Grosvalet told Hill of his action in cancelling the loan, Hill said that "if I didn't feel comfortable with it ... to cancel it" (378). Thereafter, in March or April 1974, when Grosvalet told Hill he would rather be in the music business and not films, Hill arranged a meeting between Grosvalet and defendant King, who knew something of the music business. Appellant and Hill were also present. After a discussion between King and Grosvalet concerning the music business, appellant suggested to Grosvalet to proceed with the original loan application for the film business and later start a music business as a subsidiary of RBG. When Grosvalet stated he felt uncomfortable with the film business because he had no collateral "to back me up should something happen," either appellant or Hill told him that Hill would give him "outright" a Sean Connery film worth at least $15,000, with which he could do whatever he wanted. As a result, Grosvalet asked the SBA to reinstate the initial loan application, which was done. Grosvalet, however, never received the Connery film, although he repeatedly asked Hill for it (379-388).

On April 10, 1974, Grosvalet met with appellant, Hill, and King at the Trans-America office, and was informed that King was replacing Hill as president of NTP. Afterwards Grosvalet and King went to the office of an attorney named Gary Wolff, who represented appellant. Wolff drafted a letter to Schulman

at the SBA informing Schulman of the change in the presidency of NTP (391-392).[24]

On May 15, 1974, Grosvalet went with King and Kristof to the loan closing at the SBA. At the closing, he received the $50,000 loan and signed a two-party check for $30,000 payable to NTP (486), which he gave to King (393-396).[25] King promised that Grosvalet would be receiving within a week the sixty-five chapters of the Wally Western film series which the RBG-NTP contract had provided for (397). When Grosvalet did not receive the films, he called King and Hill repeatedly, and was continually given different reasons as to why the films were not yet ready for delivery (397-400). As a result, in July 1974 Grosvalet first went to the consumer fraud bureau of the New York State Attorney General's office to complain about not receiving his films, and was referred to the United States Attorney's office (401, 544-545).[26]

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[24] Wolff's letter (Government Exhibit #15) is Document #45 to the supplemental record on appeal.

[25] In addition to the $30,000 check to King, Grosvalet made out other checks at the loan closing for various organizational expenses, including a $2,900 check to Directional Advertising (Government Exhibit #7A, Document #47 to the supplemental record on appeal), a company then owned by appellant, which was to have done advertising for RBG (405-413; Government Exhibit #34, Document #48 to the supplemental record on appeal).

[26] In July 1974, at a meeting with King which was tape recorded by Grosvalet, Grosvalet told King that "the United States Attorney was expecting [Grosvalet] to help nail Jerry Devins to the wall" (708).

In August 1974, King offered Grosvalet forty films, but Grosvalet refused and demanded back the $30,000 he had given King. King said he could not return the money (402-403). At the time of trial, Grosvalet was employed as a clerk-typist at the Veterans' Administration (184-185). However, as of the time of trial, Grosvalet still believed he had a valid SBA loan which was not in default (798).

The rest of the Government's extensive proof was essentially devoted to shoring up Grosvalet's testimony. For example, over appellant's demand for an offer of proof, continuing objections, and motion for a mistrial, the prosecutor elicited the testimony of another young veteran, John Ferguson, for the purpose of showing that appellant had engaged in similar schemes to defraud the SBA. Thus, Ferguson testified that in June 1973 appellant, who was introduced to him by Hill, offered to help Ferguson start an insurance business by obtaining an SBA loan. When Ferguson demanded that appellant put up his house as collateral, the deal was dropped. Although the court at first thought that Ferguson's testimony was admissible, and instructed the jurors that they could consider it as evidence of a scheme, plan, or artifice, or as to appellant's intent, the court later agreed with appellant that it was inadmissible because there was nothing illegal in appellant's discussion with Ferguson. Nevertheless, while the court instructed the jurors to disregard the testimony, the court refused to grant appellant's motion for a mistrial (813-831, 851, 900-907).

Sylvia Kristof, Grosvalet's twenty-year old girlfriend who was also an unindicted co-conspirator, generally corroborated Grosvalet's testimony (987-1125). After the initial meeting at Kirtman's studio, she accompanied Grosvalet to appellant's office where she heard appellant explain the SBA application procedures (993). She also accompanied Grosvalet when he picked up the SBA forms and brought them back to appellant's office (994-995).[27] She was present when Grosvalet received the Dunn and Bradstreet call, and heard appellant answer questions concerning RBG's assets after he introduced himself as "Hank Meyer" (996-999). She was also present with Siviglia at appellant's office when appellant, Grosvalet, and Runyon met with the S.C.O.R.E. representative. From her position outside the office where the meeting was being held, she heard either appellant or Runyon answer most of Singer's questions (1000-1001). Finally, Kristof was present at the loan closing at the SBA in May 1974 when King received the $30,000 check and promised delivery of the films in a week (1002-1003).

Like Grosvalet, however, Kristof was sure that neither Grossberg nor Kirtman was to receive any of the loan proceeds, and appellant was to receive only money due him for rent and

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[27] As indicated earlier (fn.14, p.10), Kristoff, too, said she saw appellant make out some of the duplicate SBA forms while she was present in his office with Grosvalet (996, 1013, 1121-1125).

advertising on RBG's behalf, but nothing from the proceeds of RBG's operation (701, 1023-1030, 1040). Appellant was not a stockholder in RBG and had no authority to sign checks on RBG's account (1040-1041). The originally-proposed three-way partnership, with Kirtman, Grossberg, and appellant controlling RBG, never came about as a result of Grosvalet's argument with Grossberg (1041).

The two remaining witnesses for the Government were Guy Runyon, an unindicted co-conspirator, and Nicholas Siviglia, who the prosecutor indicated should have been named a co-conspirator, but whose true role was discovered too late to be so named (1140). Runyon, an insurance salesman who shared an apartment with Hill and who had also previously been an officer of Trans-America, testified that he met appellant in 1972 at the Trans-America offices (914-921, 930). Runyon had di cussions with appellant then, in 1972, about securing SBA loans. He claimed that appellant had often said to him, "If you can get a vet, why I could get you an SBA loan" (923-924). In September 1973 appellant asked Runyon to attend the meeting at appellant's office with Singer, the S.C.O.R.E. representative (925-926). Appellant had told Runyon that Runyon could be a consultant to RBG if the SBA loan was secured, and also asked him to attend the meeting because of Runyon's knowledge of television advertising (927-928). Runyon corroborated the previous testimony that, at the meeting with Singer, appellant answered most of Singer's questions (928). Runyon con-

ceded, however, that he did answer at least one of Singer's questions concerning the meaning of the term "barter-basis" (939-940), a term used on one of the SBA forms submitted by Grosvalet (Government Exhibit #3). After leaving Trans-America's employment, Runyon and an associate started a company called JayMarr Publishing. Although Singer testified that, at the meeting with appellant, Grosvalet, and Runyon, appellant told him that Grosvalet had been previously employed by JayMarr (867-868), at trial Runyon denied that JayMarr ever employed Grosvalet (928-929).

Siviglia, an insurance agent whose license had been revoked by New York State (1195), testified that in the spring of 1973 he moved his office into appellant's building in Island Park (1134-1136). In June 1973 appellant introduced him to Grosvalet (1153), informed him that Grosvalet was going into the film business (1154), that appellant was going to arrange the financing, and that appellant, Kirtman, and Grossberg were going to be one-third partners (1155). Siviglia also claimed that appellant told him that Grosvalet was to be the "front man" or "pawn" (1156).

While Siviglia contradicted the previous testimony of Grosvalet and Kristof by testifying that it was his handwriting, and not appellant's, which appeared on the duplicate SBA loan forms (see fn.14, p.10), he testified that he had made them out at appellant's request based on worksheets appellant had given him, and that after completing the duplicate forms, he

returned them to appellant, who looked them over and gave them to his secretary, Jean Greenberg, to type (1158-1169, 1233).

Also in June 1973 appellant asked Siviglia if a company then owned by Siviglia, named Directional Advertising, could do advertising work for RBG (1175). Siviglia agreed, providing a $6,000 estimate for the required work, which was in turn submitted to the SBA (Government Exhibit #7, Document #46 to the supplemental record on appeal). However, Siviglia's Directional Advertising went out of business in March 1974, although Siviglia testified that subsequently appellant incorporated a business by that same name, and Siviglia was a signatory on the deposit card of the new Directional Advertising bank account (1178-1180).

It was during Siviglia's testimony that the prosecutor elicited from him the fact that Grosvalet was hesitant to proceed with the RBG business because, among other reasons, Grosvalet had learned that he was also to be involved in the distribution of pornographic casettes to hotels based on a deal between Kirtman and appellant. While the court sustained an objection and ordered the jurors to disregard this line of testimony, the court denied appellant's motion for a mistrial (1190-1200). Despite the prosecutor's assertion that he did not intend to elicit this testimony, the court did state, "I think it is quite serious and I believe it is intentional" (1197).

Continuing with his testimony, Siviglia testified that

he was present on July 30 or 31 when appellant picked up blank distribution contracts from Feltner at the Trans-America office (1170). It was apparently then that he saw Hill sign blank last pages of the contract (1280), contradicting Grosvalet's testimony that Hill signed the contract at appellant's office on August 1, 1973. Siviglia did testify, however, that while he did not see Hill sign the contract at appellant's office on the day he drove him and Grosvalet there, he noticed that Grosvalet left the meeting at appellant's office carrying an envelope (1229, 1282-1296). Finally, Siviglia conceded that he had obtained his personal attorney, from the firm of Lotto, Solowitz and Farr, to file RBG's certificate of incorporation, even guaranteeing the attorney's $300 fee, although he claimed to have done so at appellant's request (1205-1208).

After the Government rested and appellant's motion for a judgment of acquittal was denied, appellant proceeded with the defense case (1509-1521).

2. Appellant's Defense Case

As his first witness, appellant called Grosvalet, who testified that, at appellant's direction, he picked up RBG's corporate seal from a factory in Manhattan where it was made at about the time he submitted the SBA loan application documents (1527-1528). Later, Grosvalet received another corporate seal for RBG directly from the law firm which had done the incorpor-

ation work for RBG. These were the only two seals Grosvalet received (1533). This testimony, however, directly contradicted earlier testimony by Siviglia during the Government's case when Siviglia testified he had been present in June 1973 when August Della Pietra, an associate of appellant's, gave RBG's corporate seal to appellant at appellant's office. Siviglia claimed that Della Pietra had said then, "These are the seals I picked up from Blumberg for you" (1265-1269).

Della Pietra, who worked at the Island Park office for an insurance company owned by appellant and Siviglia (1557), also corroborated Grosvalet's testimony by denying that he had ever delivered any corporate seal to appellant (1541). Moreover, Della Pietra testified that Grosvalet had told him during the summer of 1973 that he wished that Siviglia would "hurry up" and prepare the application, that Siviglia "was taking a long time in preparing his application, and [Grosvalet] was mad about it" (1543-1544, 1550). Della Pietra stated that in all his discussions with Grosvalet concerning RBG, appellant's name was never mentioned by Grosvalet (1575). Grosvalet also had complained to Della Pietra that he had not received from Hill the films which had been promised to him (1568-1569).

On cross-examination by the Government, however, Della Pietra was asked if he recalled a meeting he had attended in July 1974 with Grosvalet, Kristof, King, Feltner, and an attorney named Daniel Greenberg, at which Kristof had said "Gerry is the one who made up all these pages" (1580-1583). Hill's

counsel, Mr. Hoffman, interjected that "This is unfair, I think this Court should instruct the witness that he has been tape recorded" (1583), a fact Della Pietra had not known because appellant's counsel admittedly had called him "cold" (1585).[28] Subsequently Della Pietra, who said he was "friendly" with appellant and had come to the trial at defense counsel's request (1601-1602), was required to be excused from the witness stand to consult with an attorney when further cross-examination on the tape-recorded meeting was pursued:

> DELLA PIETRA: ... I don't have an attorney. I don't know what I said on that tape and I don't want to embarrass myself. It might be something personal. I became socially involved with these people. I don't like this not having counsel represent me. I mean, that is fair enough. I might have said something. I have a family. I have two children. I don't know what I said there.
>
> (1603).

Later Della Pietra was recalled to the stand and essentially denied remembering statements purportedly made at the July 1974 meeting with which Hill's counsel attempted to refresh his recollection (1671-1682).

In addition to Della Pietra, appellant called two other substantive witnesses, Lawrence Grossberg and Elwin Feltner. Grossberg, the vice-president and manager of Martin Audio,

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[28] The court was prompted by this situation to remark to appellant's counsel: "You called him cold. How long have you been at the bar?" (1585).

testified that during a break in the meeting he was having at the studio with Kirtman and appellant regarding distribution of video equipment to motels, he noticed Grosvalet outside the office and asked him to come in. He introduced Grosvalet to appellant because he knew that both of them were interested in films, and Kristof, Goldberg's employee, had previously asked Grossberg to find a job for Grosvalet (1612-1613). There was not much further conversation then, and Grossberg denied having any other business interest in RBG at any time, although Grosvalet did call from time to time to tell Grossberg about RBG and ask his advice (1613-1617). Grossberg also testified that on several occasions after July 1973 when the subject of RBG came up in conversations with appellant, appellant told Grossberg that he was not involved with RBG and had turned the matter over to others, including Hill (1639).

Elvin Feltner, chairman of the board of ADI and an associate of Hill, King, Runyon, and Siviglia even before the beginning of the RBG deal (1710, 1713, 1716-1717), was called by appellant in an attempt to establish the defense theory that it was these persons, and not appellant, who had engaged in a conspiracy. Feltner testified, however, that in late 1972 or early 1973 appellant was attempting to acquire NTP through negotiations with Hill and Shields, who were officers of both ADI and NTP (1757-1761, 1844-1845, 1876). The deal fell through when appellant could not come up with the money (1844, 1876-1877). Unknown to Feltner, however, as part of the negotiations with

appellant Shields had changed NTP's name to Prestige Industries, although appellant had no interest in Prestige (1707). When Feltner discovered this in June or July 1974, he told King, who had taken Hill's place as president of the supposed NTP in February 1974, to re-incorporate the name NTP, which King did (1708-1709, 1831-1836, 1847). During this period while NTP was actually unincorporated, Feltner, Hill, and King were operating on the assumption that it was still a corporation (1709, 1723). Thus, Feltner, upon being told by Hill that a deal was pending between NTP and RBG involving transferring distribution rights to the Wally Western film series and additional feature films, executed a license agreement in April 1974 whereby ADI, the actual owner of the films, gave NTP, its subsidiary, the right to transfer the films to RBG (1718-1719, 1736, 1766, 1838). The purpose of the transfer of the film rights from ADI to NTP was ultimately to raise money for ADI (1767-1768). Thus, Feltner asserted that the NTP which King incorporated was in a position to transfer the film distribution rights to RBG, if RBG had accepted delivery (1839). Moreover, Feltner was a co-signatory of the bank account opened by King in an upstate New York bank for the purpose of depositing the $30,000 received by NTP from RBG at the SBA loan closing (1722-1723, 1727-1728). In fact, Feltner himself received $3,000 from that deposit (1796, 1851). At the meeting in July 1974, which Grosvalet had secretly tape-recorded, Feltner, who had been asked to attend by King, tried to convince Grosvalet to accept delivery of the contracted-for films, and to

persuade Grosvalet that King could make delivery (1789, 1795).

There were two final witnesses called by appellant, each of whom was examined by defense counsel's associate, Mr. Farley, when defense counsel left for a bankruptcy hearing (1901). The first was Bernard Creamer, a cashier from the bank in Cuddebackville, New York, where King had deposited the $30,000 check from RBG, who was called for the purpose of establishing to whom the proceeds of the $30,000 was distributed. The second witness was Andrew Heberer, a handwriting expert called for the purpose of establishing that appellant's handwriting did not appear on any of the SBA forms.

However, when it developed that neither witness had been properly prepared and that Farley could not establish a proper foundation for their testimony, they were both initially excused (Creamer, 1902-1927; Heberer, 1930-1940),[29] only later to be recalled (Creamer, 1940-1960; Heberer, 1976-1990). Heberer, in particular, confirmed that the SBA duplicate forms were not in appellant's handwriting. At the conclusion of Heberer's testimony, defense counsel rested appellant's case, and Hill rested as well.

After motions, closing arguments, and the court's charge,[30] the jurors retired for deliberations at 4:35 p.m. on April 23,

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[29]Farley's handling of the direct examination of Creamer prompted appellant himself to complain of defense counsel's absence from the trial (1916-1917).

[30]The charge is C to appellant's separate appendix.

1975, and returned with their verdict at 10:05 p.m., convicting appellant on all counts. The following morning the jurors acquitted Hill on Counts One and Three.

B. The Post-Trial Hearing

The post-trial hearing, held in November 1975, was devoted primarily to the issues of inadequate assistance of counsel and prosecutorial misconduct.

The principal allegations on the inadequacy of defense counsel, Bernard J. Coven, concerned his divided loyalties to appellant's defense and his lack of preparation and effort on appellant's behalf.

Thus, four witnesses at the hearing testified to Coven's preoccupation with his own financial situation and his repeated threats to terminate the defense case unless appellant arranged for Coven to receive a bank loan.[31] Robert J. Quigley, a loan officer at Long Island Trust Company and a business associate of appellant's who had been retained by appellant to help prepare the defense (H.88-89, 104, 107, 121),[32] testified that

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[31] Although Coven's demands for money and financial concerns were fully elaborated at the hearing, there were indications of these matters even during the trial (1331-1332, 1685, 1861).

[32] Numerals in parentheses preceded by "H" refer to pages of the transcript of the post-trial hearing, dated November 3, 5, 6, 1975, and found as Document #18 to the supplemental record on appeal.

prior to and during trial Coven repeatedly "ranted and raved" to Quigley (H.92) about his need for money to keep his office going. Coven threatened to "end the trial, he was going to cut it short if he didn't get some money" (H.93). Coven had sent Quigley promissory notes which he wanted Quigley to discount, but Quigley refused to do so, and Coven never did obtain the loan (H.93, 99). After Coven had rested the defense case, he called Quigley again for a loan, telling him that

> [h]e had rested the case and that it was in large part due to the fact that he needed money and that he had to get on with his business....
>
> (H.98-99).

Quigley's testimony on this matter was corroborated by Irwin Schwartz, a private investigator hired by the defense. Schwartz testified that, during the trial,

> ... I heard Mr. Coven state to Mr. Devins that he could not continue this trial and he will cut this trial short and he will not give his full attention.... Mr. Coven said to Mr. Devins that he had serious money problems and that he required time to take care of these problems, because in his words he will not go down the drain with Jerry Devins, he will not let his office go down the drain; Mr. Devins has banking connections, and therefore Mr. Devins should help him in getting these bank loans through so he, Mr. Coven, would not have these pressures.
>
> (H.149).

Both Quigley's and Schwartz's testimony was further corroborated by appellant's wife, Dian Devins (H.229-230), and by appellant himself (H.240-255), who also asserted that during

cross-examination of certain Government witnesses, Coven had told appellant that

>]e [Coven] didn't want to get involved with them because he felt that they would hurt other clients that he was involved with directly and it would create problems for other people that he felt he could bring it out otherwise without hurting people that he was directly involved with.... I said to him "This is wrong, we have got to" -- he said "I will get it another way, don't worry," leave it to him...let him run the trial, I am innocent, he will prove it, there is no way I can be convicted.
>
> (H.326).

Coven, a practicing attorney for thirty-two years who had recently been enjoined by Judge Pierce in the Southern District of New York from engaging in further illegal securities transactions, based on Judge Pierce's finding that Coven had "displayed very little if any sensitivity to his responsibilities" as an attorney (H.55, 66),[33] was called by appellant as a witness. Coven conceded that, on the issue of his concern for money, "We told Mr. Quigley...that we required further funds from Mr. Devins which was not forthcoming" (H.36-37), and that he had told appellant during trial "We required funds from Mr. Devins and we did state in a colloquial fashion that we did not intend to be buried by Mr. Devins" (H.51). Coven nevertheless denied approaching Quigley for a loan or threatening to terminate the case early (H.35-36).

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[33] See S.E.C. v. Rega, Docket No. 73 Civ. 2944 (S.D.N.Y., August 20, 1975) (Pierce, D.J.).

In addition to Coven's preoccupation with financial concerns, it was also contended at the hearing that Coven's loyalty to appellant had been undermined by learning during trial, through the prosecutor's disclosure that appellant had attempted to inform on Coven's unrelated criminal activities in exchange for immunity from prosecution.

Thus, Robert G. Morvillo, an attorney who represented appellant in 1974 and early 1975, approached the prosecutor, Mr. Wilson, in September 1974, with appellant's authorization, seeking immunity from prosecution for appellant in exchange for information appellant possessed concerning Coven's violations of Federal securities laws. The offer was rejected, however, based on the prosecutor's belief that appellant was "incapable of telling the truth" (H.236).[34]

Thereafter, in February 1975, appellant retained Coven to represent him on the present indictment because he could not afford the fee Morvillo's firm asked to do the trial (H.240, S.7).[35] Moreover, in October 1974, appellant had a serious automobile accident in which he sustained brain damage and speech impairment, causing him to be hospitalized and bedridden

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[34] See also affidavits of Robert G. Morvillo and George E. Wilson, contained in Documents #12 and #13 to the record on appeal.

[35] Numerals in parentheses preceded by "S" refer to pages of the sentencing proceeding dated November 13, 1975, found as Document #20 to the supplemental record on appeal.

until February 1975, when appellant returned to part-time wor (H.237-238). As a result, appellant turned to Coven to represent him because Coven, who knew something of appellant's indictment, agreed to do so on a much less expensive basis and "at a fee that [appellant] could afford" (H.238-239). In return for $6,500, which appellant paid Coven, appellant testified that Coven agreed to "put his personal attention on this matter" and "[to] do an excellent job" (H.239-240). Coven had no knowledge then that appellant had offered the Government incriminating information concerning Coven. Coven testified at the post-trial hearing that, had he known of that fact, he would never have continued to represent appellant (H.39-40).

However, both Quigley and appellant testified at the hearing that Coven had indicated to both of them during the trial that he had heard of appellant's attempt to inform on him to the Government and was "annoyed" about it (Quigley, H.93-95; Devins, H.249-250). Their testimony was further corroborated by the affidavit of August Della Pietra, who did not testify at the hearing.[36] All of them agreed that Coven indicated he had heard of appellant's approach to the Government from one Len Randall, who had got the tip from Nicholas Siviglia, who in turn had received the information from the prosecutor, Mr. Wilson (H.94-95, 249-250).

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[36]See affidavit of August Della Pietra dated October 24, 1975, contained in appellant's motion for a new trial, Document #12 to the record on appeal.

Siviglia, a Government witness at trial, testified at the hearing that he had indeed been told by the prosecutor on April 10, during the trial, of appellant's attempt to gain immunity by informing on Coven (H.327-328, 331). Siviglia conceded telling one Andrew Palato about it (H.329, 331), but did not "believe" he had told Mrs. Randall (H.329) and was sure he had not told Len Randall (H.329).

The prosecutor, Mr. Wilson, did not dispute that he gave Siviglia the information concerning appellant, but sought to justify his disclosure by asserting:

> We see no requirement to preserve Mr. Devins' confidence. There are legitimate reasons we want to discuss with Government witnesses Devins' efforts to commit acts of treachery against his own attorney. Amont those reasons ... was not a deliberate attempt to torpedo his own defense.[37]

Coven himself admitted at the hearing that Mr. and Mrs. Randall had made a "special trip" to tell him

> ... to watch out for Gerry Devins, that Mr. Devins would sell me or anybody else including his mother and he is a very dangerous type of character.
>
> (H.38).

Coven claimed, however, that this conversation occurred before the commencement of trial, denied that he knew during trial of

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[37]This statement by the prosecutor was made during argument on the motion, found in the minutes dated November 11, 1975, at page 19, and included as Document #19 to the supplemental record on appeal.

appellant's earlier attempt to trade him for immunity, and asserted that he only learned that fact from the prosecutor shortly before the post-trial hearing (H.38-39, 60).

Finally, the claim was made at the hearing that in addition to Coven's divided loyalties, or because of them, Coven was generally unprepared, failed to call witnesses he had intended to call, and gave a truncated, inadequate summation. On the first day of trial, Coven told the court:

> I am not prepared for this trial. We have not had sufficient time to examine the evidence and make our own investigation and to interview witnesses and are being rushed to trial, rushed to trial to the prejudice of Mr. Devins.

(59).

Mr. Hoffman, Hill's counsel, apparently agreed, for, at the same time, he told the court that "Mr. Coven ... spent most of his time immediately preceding trial presenting another matter" (58). Moreover, throughout the trial, Coven constantly complained of illness and the need to see a doctor (e.g., 912, 1373-1374, 1685), causing the court to remark, "You shouldn't extend yourself ... you shouldn't take these cases ... this is no way to conduct a trial" (1373).

At the hearing, appellant corroborated Coven's initial assertion of unpreparedness by testifing that he conferred with Coven about the trial only the weekend before it commenced and that Coven had complained of his lack of preparation as he and appellant drove to court on the first day of trial (H.241-

242). Coven, however, denied at the hearing that he was unprepared, and claimed that his statement to the contrary at the beginning of trial was merely a "tactic" (H.22).

On the question of Coven's failure to prepare witnesses, Andrew Heberer, the handwriting expert who was called as a witness at trial, then excused, then called again, testified that he had talked to Coven only once on the telephone before appearing as a witness (H.71-72). He had explained to Coven what he would need to testify properly, and Coven assured him he would take care of it, but failed to do so (H.72).[38] When Heberer appeared at trial, he met Farley for the first time, and attempted to explain to Farley what questions to ask in order to lay a proper foundation for Heberer's testimony (H.73). Farley, who had been admitted to the Southern District bar only on April 8, 1975 -- after the trial had commenced (H.6) -- did not have time to speak to Heberer and left for the courtroom (H.73). The resulting manner in which Heberer was examined caused him later to have an argument with Coven and Farley, during which Heberer said that "in the many courts I have appeared, both federal, state, local, I never seen a case so ill prepared as far as the document viewpoint would be concerned" (H.75-76, 78).

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[38] Heberer's hearing testimony was corroborated in part by Schwartz, who testified that when he explained to Coven what Heberer required in the way of handwriting exemplars, Coven brushed him off by saying, "I'll do it later" (H.148).

While admitting that he had not spoken to Heberer prior to Heberer's testifying (H.31-33), Coven denied at the hearing that he had had an argument with Heberer (H.35). Coven claimed that Heberer's "dissatisfaction" may have been due to a billing problem (H.35), although Heberer himself denied that his lack of preparation and resulting excusal from the stand was in any wan related to a failure to receive a fee (H.87).

In addition to the issue of counsel's failure to prepare witnesses properly, appellant also claimed at the hearing that there were a number of witnesses whom Coven failed to call at all. Schwartz, the investigator, testified there were at least four witnesses who had been served with subpoenas but who were not called to testify (H.173). Among the potential witnesses whom Coven failed to call were (1) Leonard Kirtman, one of appellant's alleged co-conspirators, who appeared in court at Coven's request, but was never asked to testify (H.179-185)[39]; (2) Jacques Falerne, a former employee of Trans-America, who had been interviewed by Quigley and would have testified to various illegal practices involving Feltner (and presumably Hill) (H.89-91); and (3) appellant himself, who had wanted to testify (H.153).

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[39]Coven claimed that the reason he did not call Kirtman was that he had heard that Kirtman's testimony would be "devastating" to appellant (H.27). However, Kirtman denied telling anyone that he would give testimony devastating to appellant if he were called as a witness (H.186).

Finally, it was undisputed at the hearing that Coven's preparation for his summation did not begin until midnight of the night before he was to deliver it (H.151), even though the court had terminated early the day before in order to give counsel adequate time to prepare (2010). Moreover, Coven himself admitted that he had slept for no more than half an hour and was in a "tired condition" when he gave his summation (H. 40, 42). Coven claimed, however, that his late start in preparing a summation was because of appellant's failure to pay his share of the cost of the transcript and that appellant had given "bum checks" to the court reporters. As a result, he claimed that Hill's attorney had refused to turn over the transcript for Coven's use the night before the summations were to be given (H.41). Coven's claim, however, was contradicted by affidavits offered at the hearing from Miriam Perlstein, office manager of the Southern District Court Reporters, and Bernard Katz, the owner of a photocopying concern to whom appellant brought the daily copy and paid in cash for that service (see Appellant's Hearing Exhibits B and C, Documents #49-50 to the supplemental record on appeal.[40]

In denying appellant's motion for a new trial at the conclusion of the hearing, the court remarked on the question of

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[40]Coven also admitted that he had taken extensive notes during the trial (H.41). At the conclusion of Coven's summation, the prosecutor remarked, "I did not expect Mr. Coven to close so soon" (2099).

Coven's summation: "The only ... criticism that I might have was the question of the summation which appeared to me to be short" (Appendix D at 29).

The other significant issue at the post-trial hearing was whether the prosecutor wrongfully withheld proper 3500 material, in particular his notes taken during interviews with Grosvalet. Grosvalet testified that prior to trial, during interviews with the prosecutor, Mr. Wilson wrote out questions and then wrote out Grosvalet's answers to those questions (H.202). Afterwards, the prosecutor showed Grosvalet the written answers and asked Grosvalet to verify that the answers were his, which Grosvalet did (H.202). Grosvalet described the process in this manner:

> I know that [the prosecutor] wrote things that were my own words; and in reading back the questions and answers, I had had some questions about some of the answers, and in discussing them, we came to a final answer that was usually, if not all the time, my answer; the way I had known it to be.
>
> (H.203).

Grosvalet remembered that there were roughly a dozen or more pages of questions and answers which the prosecutor had (H.204). While Grosvalet's answers contained on the prosecutor's pages were not all verbatim answers (H.224-225),

> [t]here were some that were notations and there were some that were straight answers, you know, verbatim on some of them. They were kind of short, I believe. If the sentence was only a few words, then I think I believe he wrote them out verbatim. Otherwise, for the most part they were notes ... [of] actually what I did say to him.
>
> (H.224).

It was during interviews with the prosecutor that Grosvalet "quite possibl[y]" (H.210) told him that appellant had advised Grosvalet not to give any money to Hill or King until he had received the films for them, advice which appellant in fact had given Grosvalet (H.210). Grosvalet also remembered telling the prosecutor during these interviews that he did not know for sure who had prepared the SBA application (H.210).

At the conclusion of Grosvalet's testimony, counsel requested the court to examine whether the notes of Grosvalet's interviews with the prosecutor were consistent with Grosvalet's testimony at trial (H.226). Neither counsel at the hearing nor trial counsel, who had made the same application, ever actually saw the prosecutor's notes of Grosvalet's interviews (H.226).[41]

After the defense rested at the hearing, the prosecutor did not put on any witnesses in rebuttal, and on November 11, 1975, the court denied the motion (Appendix D). On the question of adequacy of counsel, the hearing court concluded that Coven "handled [the trial] competently" and that there was "adequate representation" (Appendix D at 29). On the issue

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[41] Based on Grosvalet's similar testimony at trial, as well as that of Kristof, to the effect that during a number of interviews the prosecutor took extensive notes (430-432, 1073-1074), applications were made repeatedly for the prosecutor to turn over his interview notes concerning the testifying witnesses under 18 U.S.C. §3500 (432, 461-465, 1149-1150). The court instead directed that the prosecutor seal his notes at the end of trial so that they would be available in the event of an appeal (1150-1151).

of whether Coven became aware of appellant's attempt to inform on him, the court concluded that appellant

> ... readily admitted ... that he had done so prior to retaining Mr. Coven to defend him and with full knowledge of his having done so that he still elected to proceed to retain the services of Mr. Coven in defense of his lawsuit. He had a choice either to retain Mr. Coven or not to retain him. With the knowledge that he had, I think he made a knowing choice of counsel to represent him.
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> (Appendix D at 27-28).

Finally, on the issue of the 3500 material, the court concluded that "only upon an extreme stretch of the imagination could that be deemed 3500 material." Rather, the prosecutor's notes of Grosvalet's interviews

> ... are usually not considered 3500 material. As I say, it probably was not 3500 material. If it was 3500 material there was no deliberate withholding of it from the defense and that the turning of it over to the defense would not have resulted in a different verdict from this jury.
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> (Appendix D at 25-26).

ARGUMENT

Point I

TRIAL COUNSEL'S DIVIDED LOYALTIES, RESULTING IN LACK OF PREPARATION AND PREMATURE TERMINATION OF THE DEFENSE CASE, DEPRIVED APPELLANT OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The right of a criminal defendant to adequate assistance by competent counsel is guaranteed by both the Sixth Amendment's mandate that an accused shall "have the assistance of his counsel for his defense," and the Fifth Amendment's requirement of due process of law. See, e.g., Avery v. Alabama, 308 U.S. 444 (1940). It has been said of the Sixth Amendment right that it "is a defendant's most fundamental right 'for it affects his ability to assert any other right he may have.'" United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973).

The standard in this Circuit for the successful assertion of the denial of effective assistance of counsel is a strict one. It requires a defendant to show that the representation was so woefully inadequate as to shock the conscience of the court and to make the proceedings a farce and mockery of justice. United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974); United States v. Wight, 176 F.2d 376, 379 (2d Cir.),

cert. denied, 338 U.S. 950 (1950).[42] Where such a performance by defense counsel has been demonstrated, however, this Court has not hesitated to vacate a conviction. See, e.g., United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967). In the instant case, appellant submits that even this Circuit's strict standard has been met.

Appellant had a right to expect that his counsel's only concern would be "the faithful representation of the interest of his client," (Follette v. Henderson, 411 U.S. 258, 268 (1973)), and that counsel would be free from "a conflict of interest which could reasonably have a direct bearing on the loyalty of counsel to his client." United States v. Nadaline, 471 F.2d 340, 345 (5th Cir.), cert. denied, 411 U.S. 951 (1973).

> One of the cardinal principles confronting every attorney in the representation of a client is the requirement of complete loyalty and service in good faith to the best of his ability.... The same principles are applicable in Sixth Amendment cases ... and suggest that an attorney should have no conflict of interest and that he must devote his full and faithful efforts toward the defense of his client.
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> Johns v. Smyth, 176 F.Supp. 949, 952 (E.D.Va. 1959).

See also American Bar Association, CODE OF PROFESSIONAL RESPONSIBILITY, EC5-1 (April 1975).

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[42] This Circuit continues to adhere to its strict standard despite its recognition of the fact that other Circuits have adopted less stringent standards. United States v. Yanishefsky, supra, 500 F.2d at 1333, n.2; see, e.g., Moore v. United States, 432 F.2d 730, 737 (3d Cir. en banc 1970); West v. Louisiana, 378 F.2d 1026, 1032-1034 (5th Cir. 1973); United States v. DeCoster, supra, 487 F.2d at 1201-1204; see also United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 46-48 (2d Cir. 1972) (Kaufman, J., dissenting).

Yet here defense counsel's loyalties to appellant were fatally divided by his complete preoccupation with his own deteriorating financial situation and by the unavoidably prejudicial, although understandable, animus he felt for appellant upon learning during the trial, as a result of the prosecutor's improper disclosure, that appellant had attempted to obtain immunity for himself by offering to inform the Government of counsel's unrelated criminal activities.

As to counsel's concern over his own financial condition, and the extremes to which that concern drove him, there can be little doubt. While much of this information was disclosed during the post-trial hearing, there were indications of it on the record during the trial as well. Thus, on several occasions during trial, defense counsel alluded to his financial difficulties, requesting the court to terminate early or for permission to absent himself completely.

For example, during the second week of trial, counsel asked the court:

> Is there any chance that we are going to get off early today? I am going bankrupt in my office.
>
> THE COURT: That is not a valid excuse.
>
> COUNSEL: Your Honor has been an attorney--
>
> THE COURT: We have a long way ahead of us. We have another week of this.
>
> COUNSEL: I don't think I can do it. I have a trial almost continually for two months. I am on trial every day.
>
> (1331-1332). Emphasis added.

On yet another occasion, while the defense case was in progress, defense counsel told the court that "[a]t 11 o'clock Judge Galgay is holding a short hearing as to legal fees in some cases I have been in volved. Mr. Farley, who is associated with me, will be taking over one or two witnesses at that time" (1861). When the time came, and apparently without the court's consent (1901, 1927), counsel abruptly left the courtroom, turning over the conduct of the proceedings to Mr. Farley, who had only just been admitted to the District Court bar while the trial was in progress.

The prejudice to appellant in having a defense counsel whose attentions were divided between the trial and his law practice is readily apparent from Farley's inept handling of the two witnesses he examined. Bernard Creamer, called for the important purpose of demonstrating that the proceeds of the SBA loan were distributed to King, Hill, and Feltner, rather than to appellant, had never been spoken to previously by Farley (1925). Not surprisingly, then, particularly in view of Farley's inexperience, Farley was initially unable to lay a proper foundation through Creamer's testimony for the admission of bank documents, thereby prematurely requiring Farley to excuse Creamer from the witness stand. Indeed, it was Farley's bumbling manner in examining Creamer which caused appellant himself to complain to the court of Coven's absence and to request that the court ensure Coven's presence since "[h]e is the only one that knows the complete history of the case

and has been here continually" (1916-1917).[43]

Farley's examination of the handwriting expert, Heberer, was similarly inept, but with even more damaging effect. Heberer had been called for the purpose of laying to rest the prosecutor's initial devastating proof, through Grosvalet and Kristof, that it was appellant's handwriting which appeared on the duplicate SBA documents. When it became clear, however, that Heberer had never authenticated appellant's handwriting (i.e., that Heberer had never actually seen appellant prepare the handwriting exemplars, but had only been given exemplars which reportedly were in appellant's handwriting (1934)), and thus was unable to say whether or not it was appellant's handwriting on the duplicate SBA forms, he too was initially excused from the stand. As Heberer himself later testified at the hearing, he had never seen a case "so ill prepared as far as the document viewpoint would be concerned."

Because of the incredible ineptness with which Farley examined Heberer, the jurors could not help but believe that appellant had attempted to trick them on the crucial question of whose handwriting appeared on the SBA documents. This mis-

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[43] Farley's handling of Creamer's testimony caused Creamer later to remark to Irwin Schwartz, a defense investigator, that Creamer "felt that [Farley] wasted [Creamer's] time and the time of the Court pointing a finger at the lack of ability on the part of Gerald Devins' defense attorney. Mr. Creamer further stated to me that Mr. Farley 'didn't do his homework' and was totally unprepared." Schwartz affidavit, p.2, Document #12 to the record on appeal.

handling of Heberer's testimony was particularly inexcusable since Heberer had tried to explain to Farley what foundation was required for his testimony, only to be told by Farley that Farley had no time to listen (H.73, 76).[44]

These incidents prompted the court to remark that defense counsel's absence was "just incredible behavior" (1927), and upon counsel's return from his bankruptcy hearing, the following colloquy ensued:

> THE COURT: ... It is absolutely unconscionable of you not to tell me of your appointment with Judge Galgay, and I would not give [sic] you permission to go.
>
> Now, Mr. Devins said he wouldn't go beyond an hour.
>
> COUNSEL: I am controlling this case.
>
> THE COURT: Your client also has some rights here.
>
> Well, all you need, in the event of a conviction, is a 2255 application.
>
> (1964-1965).

Nor was Coven's absence from the proceedings the only manifestation of his distraction and divided loyalty over financial problems. Four witnesses at the hearing, including two (Schwartz and Quigley) who had no motive to lie, corroborated the fact that Coven had "ranted and raved" during trial

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[44] Although Heberer was later recalled to the stand and examined by Coven himself, who successfully elicited the fact that the handwriting on the duplicate SBA forms was not appellant's (1976-1990), there is no reason to believe that the initial shabby impression of trickery, as a result of Farley's ineptness, was dissipated.

about his need for money, and sought to pressure Quigley for a bank loan at the risk of terminating the defense case early if he did not get it. Coven himself conceded that he not only discussed with Quigley his need for "further funds," but also that he had told appellant that he "did not intend to be buried" by appellant. In light of these admissions, combined with the unimpeached testimony of the other witnesses at the hearing and Coven's own statements during trial, Coven's denial that he made any such threats can be quickly discounted, particularly since the hearing court failed to make any finding of fact to the contrary (see Appendix D).

Just as there can be no question that Coven's loyalty to appellant and his case was hopelessly divided by Coven's frantic concern for his own financial situation, so too there is little doubt that those loyalties were fractured completely by his discovery during trial that appellant had offered to inform on him in exchange for immunity from prosecution. It is also clear that the original source of that information was the prosecutor's own improper disclosure to Siviglia during trial. The hearing testimony of two witnesses (Quigley and appellant) and the affidavit of a third (Della Pietra) all corroborated the fact that Coven had heard of appellant's attempt to inform on him from Len Randall, who had received that information from Siviglia, who in turn had received the information from the prosecutor. Siviglia himself further corroborated the essential linkage by testifying that the prosecutor had indeed

given him that information during trial, which Siviglia in turn passed on to Andrew Palato.[45] Finally, the prosecutor did not deny giving Siviglia that information during trial, claiming only that he had "legitimate reasons" for doing so not involving "a deliberate attempt to torpedo [appellant's] defense."[46]

Despite Coven's self-serving statements to the contrary,[47] the inference is compelling that Coven heard during trial of appellant's attempt to inform on him in exchange for immunity, that the source of that information may have been Mrs. Randall, if not Mr. Randall, that the Randall's in turn had gotten the information from Siviglia or Palato, an associate of Siviglia's and appellant's, and that Siviglia had received this information

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[45] Although Siviglia was certain he had not repeated the prosecutor's disclosure to Len Randall, he admitted talking to Mrs. Randall after his conversation with the prosecutor, but did not "believe" he had told her of appellant's attempt to inform on Coven (H.329).

[46] Appellant submits that there exists no "legitimate' reason for the prosecutor s disclosure to a witness in the case of appellant's attempt to inform on his trial counsel about matters unrelated to the case itself. Whether or not the prosecutor actually intended it (and there was no claim at the hearing that he did), the effect of his disclosure was to risk "torpedo[ing]" the defense. It is fundamental that the Government may not impair a defendant's Sixth Amendment right to effective assistance of counsel by sowing the seeds of disloyalty or conflict in the defense camp. Cf. Wounded Knee Legal Defense Committee v. FBI, 507 F.2d 1281 (8th Cir. 1974).

[47] Coven's interest as a witness in protecting his professional reputation makes suspect his denial of knowledge during trial that appellant had tried to inform on him, especially since Coven himself admitted that the Randalls had made a "special trip" to warn him that appellant would "sell" him.

from the prosecution.

Indeed, the hearing court appeared to assume the foregoing chain and, in any event, made no specific finding of fact to the contrary, concluding instead that appellant

> ... had a choice either to retain Mr. Coven or not to retain him. With the knowledge that he had, I think he made a knowing choice of counsel to represent him in connection with the defense of these lawsuits.
>
> (Appendix D, pp. 27-28).

While appellant's retention of the lawyer upon whom he had earlier attempted to inform may have been unwise or even foolhardy, the court's finding that he made a "knowing choice of counsel" is irrelevant. The fact that counsel is retained and may be dismissed is not determinative of claims of ineffective assistance of counsel. United States v. McCord, 509 F.2d 334, 351 n.63 (D.C. Cir.), cert. denied, 421 U.S. 930 (1975); West v. Louisiana, supra, 478 F.2d at 1032-1034. Appellant had retained Coven believing that Coven was unaware of appellant's earlier approach to the Government. Further, Coven was retained at a time when appellant was still recovering from a serious injury and while in a weakened financial and medical condition. Indeed, appellant testified uncontradicted that the first time he was able to leave bed after his car accident in October 1974 was when he appeared for arraignment on this matter in December 1974 (H.237). It is therefore not surprising that appellant would turn to Coven not only as a lawyer whose services he could afford but one who was also acquainted with the charges

appellant was imminently facing.

However unworthy appellant's attempt to inform on the lawyer he later chose to retain, he was entitled to have counsel who was free from disloyalty unnecessarily generated by the prosecutor's improper disclosure. This Court, like the District of Columbia Circuit, should have "no quarrel with [appellant's] assertion that disloyalty or conflict of interest may, if substantial and proven, result in the denial of effective assistance of counsel in contravention of the Sixth Amendment." United States v. McCord, supra, 509 F.2d at 351-352. Here, defense counsel's conflict of interest and divided loyalty was both substantial and proven, and should result in a new trial even without a showing of prejudice, since "proof of prejudice may well be absent from the record precisely because counsel has been ineffective." United States v. DeCoster, supra, 487 F.2d at 1204.[48]

In the instant case, however, the prejudicial impact of Coven's divided loyalty, whether it was due to his preoccupation with financial concerns or his knowledge that appellant had tried to inform on him, or a combination of the two, was amply demonstrated. It was manifested in Coven's lack of pre-

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[48] For example, it would be difficult, if not impossible, to show the prejudice to appellant in Coven's failure to cross-examine vigorously certain Government witnesses for fear "they would hurt other clients that he was involved with directly," a statement appellant claimed Coven made to him during trial.

paration, failure to call witnesses, and early termination of the defense case.

Coven himself stated to the court on the first day of the trial that "we have not had sufficient time to examine the evidence and make our investigation and to interview witnesses...." His subsequent, self-serving claim at the hearing that this statement was merely a "tactic" is amply refuted by his conduct of the proceedings.[49] Thus, in addition to the inept examination by Farley of the two unprepared defense witnesses, Creamer and Heberer, occasioned by Coven's abrupt departure for a bankruptcy hearing, Coven also called Della Pietra "cold," without having told him that Grosvalet had previously tape-recorded a conversation of Della Pietra's of which the Government had a transcript. This inexcusable failure on Coven's part, which prompted the court to remark, "How long have you been at the bar?", caused Della Pietra to beat a hasty retreat from the witness stand to consult an attorney, claiming "I don't know what I said on that tape and I don't want to embarrass myself." This incident not only unavoidably destroyed Della Pietra's credibility in the jurors' eyes, but also made it appear that appellant had unfairly used him by not warning him of the tape in the first place.

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[49] Coven's lack of preparation was confirmed at the time by Hill's counsel, Mr. Hoffman, who informed the court that Coven had been busy trying another case just prior to the start of the trial here, and by appellant's testimony at the hearing that Coven had admitted to him his lack of preparation.

Moreover, it was undisputed, save by Coven's own suspect denials, that he had failed to call a number of witnesses who were important to the defense. For example, Coven did not call or even interview Jacques Falerne, a disgruntled former employee of Trans-America, who had been interviewed by Quigley and would have testified to Feltner's involvement in the type of illegal activities appellant had claimed he was the victim of in this case (H.88-91). Such testimony would have tended to support the defense theory that it was Feltner and Hill, both of whom were associated with Trans-America, who had conspired without appellant's knowledge.

Coven also failed to call Leonard Kirtman, an alleged co-conspirator of appellant's, who was prepared to testify that he had never heard Grossberg ask "Is there a veteran in the house," that he never entered into or discussed entering into a partnership arrangement with appellant and Grossberg using Grosvalet as an employee, and that he never entered into or discussed entering into any relationship with Grosvalet to obtain an SBA loan (see Kirtman's affidavit, Document #12 to the record on appeal).

Finally, and perhaps most importantly, Coven failed to call appellant as a witness, although as the investigator Schwartz confirmed at the hearing, appellant had wanted to testify.[50]

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[50]There were as well a number of other witnesses who had either been subpoenaed by Coven or whom he had agreed to call but failed to do so and rested his case instead (Schwartz, H.173; Devins, H.251-254).

The culmination of Coven's abandonment of the defense was his halfhearted, platitudinous summation (2076-2099), which caused both the prosecutor at trial (2099) and the court at the hearing (Appendix D at 29) to comment on its brevity.[51] In view of the late hour at which counsel began preparing it and his lack of sleep before delivering it, it is hardly surprising that the summation, in addition to its brevity, was entirely unfocused and confusing.

Despite the hearing court's attempt to minimize the importance of Coven's summation on the question of adequacy of counsel, the Supreme Court has said that

> [i]n a criminal trial, which is in the end basically a fact-finding process, no aspect of such advocacy could be more important than the opportunity finally to marshall the evidence for each side before submission of the case to judgment.
>
> Herring v. New York, 422 U.S. 853, 862 (1975).

After a long and complicated trial, the failure of appellant's counsel to marshall effectively the evidence in summation is clearly a serious deprivation.

In sum, appellant is not here "complaining of alleged tactical errors or mistakes in strategy" (United States v.

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[51] While the hearing court, referring to Coven's summation, may have been correct in remarking that "[e]very attorney has a different way in which he appraises the effect upon the jury of what he has to say" (Appendix D at 29), it is instructive to compare the length of Coven's summation (23 pages) with that of counsel for Hill (57 pages) and with the prosecutor's (60 pages).

Garguilo, 324 F.2d 795, 797 (2d Cir. 1963)), but rather of hopelessly divided loyalty and diverted attention on the part of trial counsel, resulting in the failure to present appellant's defense effectively. While no single mistake or omission on counsel's part would have required a finding of ineffective assistance of counsel, taken as a whole, the record shows that defense counsel here, as Judge Pierce found he did in the Rega case,[52] "displayed very little if any sensitivity to his responsibilities" as an attorney. Thus, despite the District Court's conclusion to the contrary, appellant contends that the representation of defense counsel in this case was so woefully inadequate that it should shock the conscience of this Court.

Accordingly, appellant's conviction should be reversed and a new trial ordered.

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[52]See supra at page 31 and fn.33.

Point II

THE COMBINATION OF THE PROSECUTOR'S MISCONDUCT AND THE COURT'S ERRONEOUS RULINGS DURING THE PROCEEDINGS DEPRIVED APPELLANT OF A FAIR TRIAL.

A. The prosecutor's use of Ferguson's irrelevant testimony irreparably prejudiced the jury.

Over appellant's demand for an offer of proof (814) and his repeated objections to the entire line of testimony (821, 825, 831), the Government was permitted to introduce as a "similar act" (824) the testimony of John Ferguson, a young Army veteran from the South with whom appellant purportedly discussed a business deal involving an SBA loan application which never came to fruition. Three days after the admission of that testimony, the court came to agree with appellant that the conduct testified to by Ferguson was neither illegal nor relevant to the charges for which appellant was on trial (962-965), and warned the prosecutor to be "more cautious" (965). Despite the court's effort to rectify its earlier error in admitting Ferguson's testimony by ordering the testimony stricken and directing the jurors to disregard it (970, 2145), the prejudice to appellant inherent in Ferguson's testimony could not so easily be cured. Accordingly, appellant's motion for a mistrial should have been granted.

It is now firmly established in this Circuit that "evidence

of other criminal offenses is admissible if it is relevant for some purpose to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." United States v. Papadakis, 510 F.2d 287, 294 (2d Cir.), cert. denied, 421 U.S. 950 (1975); see also United States v. Torres, 519 F.2d 723, 727 (2d Cir. 1975); United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967); United States v. Bozza, 365 F.2d 206, 213 (2d Cir. 1966). But not every prior similar offense is admissible:

> Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage [on the Government's direct case] may be held to be an abuse of discretion.
>
> United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965).

Here, the conduct testified to by Ferguson, which the Government sought to introduce as a "similar act" under Deaton, supra (966), was not criminal in nature. Rather, Ferguson testified merely that appellant offered to help him obtain an SBA loan to establish an insurance business in which Ferguson would receive a salary of $300-$400 per week in addition to a $5,000 bonus. The proposal was dropped and no application for an SBA loan was ever submitted when Ferguson asked appellant, and appellant refused, to put up his house as collateral for the loan. This course of conduct did not describe any crime on appellant's part, and the trial judge so found. Thus, it was not "similar"

to any of the crimes charged in appellant's indictment.

Moreover, appellant's negotiations with Ferguson were not relevant to any of the crimes charged in the indictment. Appellant was not charged with defrauding veterans, but rather with conspiring to defraud the SBA and with causing false statements to be made in Grosvalet's SBA application. The fact that appellant had completely lawful discussions concerning an SBA loan with one or several veterans was in no way relevant to establish appellant's intent to defraud the SBA through the filing of Grosvalet's application, and this too was found by the trial judge (965, 967). As the District Court observed, "[I]f [appellant] got a legitimate loan for veterans what is the problem with it?" (967).

Furthermore, even assuming that Ferguson's testimony had some minimal relevance to the charges for which appellant was being tried, the potential prejudice of that testimony outweighed its probative value. United States v. Papadakis, supra; United States v. Bozza, supra. The impression the prosecutor sought to convey to the jury was that appellant was a sophisticated business man who actively attempted to dupe and take advantage of unwitting, callow Vietnam veterans. This tactic of the prosecutor was accomplished not only through the testimony of his witnesses like Guy Runyon, who claimed that appellant had said "If you can get me a vet, why, I could get you an SBA loan" (923), and Nicholas Siviglia, who claimed that appellant had termed Grosvalet as "merely a front man or a

pawn" (1155-1156), but even more directly by the prosecutor himself. In his summation, after referring to Grosvalet, a co-conspirator, as a "tool" of appellant (2105, 2110, 2112, 2116), the prosecutor went on to describe the manner in which appellant and his other co-conspirators had used Grosvalet:

> [Grossberg] runs out: "Who is a veteran? Grab him. Take him inside. Boy, we are going to do big things for you, put you in business."
>
> Recall the testimony. Kirkman, Grossberg and Devins are going to be one-third ... partners, form a corporation and Robert would be the president. He would be an employee of that corporation....
>
> However, on the SBA loan application who is the 100% stockholder of the corporation? Robert Grosvalet.... [Devins, Grossberg, and Kirkman] are silent partners. Who is carrying the weight for the loan, who is going to pay the $50,000? The guy who is a Vietnam vet. Consider that.

(2119). Emphasis added.

The irrelevant testimony of Ferguson, describing what must have appeared to the jurors as a similar attempt by appellant to dupe another Vietnam veteran, only served to solidify the venal impression of appellant the prosecutor sought to convey. As defense counsel argued in moving for a mistrial, this attempt to depict appellant as the type of person who took unfair advantage of veterans created an "overmastering hostility" in the jurors which outweighed any probative value Ferguson's testimony might otherwise have:

> We have the problem of veterans which are uppermost in the public's mind both by rea-

> son of our veterans demanding more benefits and so forth, which is a current topic amongst the citizenry today.
>
> (906).

Thus, because appellant's purported discussion with Ferguson was neither criminal in nature nor relevant to the issues being tried, and its prejudicial effect far outweighed its probative value, the trial court was fully justified in ultimately excluding Ferguson's testimony.

However, the court's attempt to cure the prejudice by ordering the testimony stricken and instructing the jurors to disregard it can hardly be viewed as an effective remedy. The objectionable evidence was not simply an inadvertent sentence or two, but rather a witness' entire testimony, consisting of almost twenty pages of the record (813-830). Moreover, that testimony was heard at the end of the proceedings on Friday, April 11, and was not stricken until the afternoon of April 14, which, as counsel for defendant Hill noted, gave "a weekend recess ... for the jury to think about it and remember it in whatever fashion they did" (901).[53] Indeed, the court itself

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[53]The court refreshed the jurors' memory of that testimony at the beginning of the proceedings on April 14, before the decision to strike it, when the judge told the jurors:

> Members of the jury, the last witness on Friday ... Mr. Ferguson from Kingsport, Tennessee, his testimony was offered solely as to the defendant Devins and solely on the question of his intent about which I will instruct you further, no request having been made for me to do so at this time.
>
> (851).

compounded the error and ensured that the jurors would not soon forget Ferguson's testimony by first instructing them, over appellant's objection (825, 904) when the court thought the testimony properly admissible, that the testimony was being offered "on the basis of a scheme, artifice, or device, a similar plan, not the plan charged in the indictment" (825). By commenting on Ferguson's testimony in this fashion, the court reinforced the prosecutor's tactic of portraying appellant as a person who had a "scheme" to bilk or dupe Vietnam veterans.[54]

Nor should the trial court's belief that Ferguson's testimony was "harmless error" which "didn't have any effect on the jury's mind as to the defendant Devins" (965-966) be given any particular weight. A trial judge should not be permitted to insulate an admitted error from appellate review simply by stating on the record that he did not "feel" the error had any effect on the jury. Significantly, defense counsel in this case, who had as much or more opportunity to observe the impact of Ferguson's testimony on the jury, was convinced that the instructions were inadequate to cure the prejudice (1127).

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[54] Even when other or similar crimes evidence is admissible this Court has recognized the futility of instructing the jury on its limited purpose and the danger that the jury, despite the most careful instructions, will nonetheless conclude that "having committed the prior similar criminal act, [the defendant' probably committed the one with which he is actually charged." United States v. Byrd, supra, 352 F.2d at 574. See also United States v. Puco, 453 F.2d 539, 542 (2d Cir. 1971).

In short, in view of the nature of Ferguson's testimony and the unusual manner in which it was first presented for, then taken from, the jury's consideration, there can be no assurance that the jury either disregarded it or considered it insignificant. Accordingly, appellant's motion for a mistrial should have been granted.

B. Siviglia's irrelevant testimony, intentionally elicited by the prosecutor, that appellant was involved in the distribution of pornographic cassettes, irreparably prejudiced the jury.

On Nicholas Siviglia's direct testimony, the prosecutor elicited from his witness the fact that Grosvalet had told Siviglia during the summer of 1973 that he, Grosvalet, was unsure whether he would continue dealing with his "business partners" because there was a "new wrinkle" -- they wanted Grosvalet to distribute pornographic cassettes to hotels (1190-1191). Upon appellant's objection, the court ordered that testimony stricken on the ground that it was irrelevant and directed the jury to disregard it (1190-1191). Over appellant's continuing objections (1192, 1193), the prosecutor nevertheless succeeded in further eliciting from Siviglia the fact that when appellant introduced Siviglia to Grossberg and Kirkman, two of appellant's co-conspirators, at Kirkman's film studio during the summer of 1973, appellant "was working out the details of the

cassette distribution with Mr. Kirkman" (1193). The court denied appellant's immediate motion for a mistrial (1193), and merely instructed the jurors to disregard Siviglia's statement.

At a conference afterwards outside the jury's presence, despite the prosecutor's protestations that he had not intended to elicit Siviglia's reference to pornographic cassettes and appellant's involvement with them,[55] the court stated, "I think it is quite serious, and I believe it is intentional" (1197).[56] Nevertheless, the court again denied appellant's motion for a mistrial. As a result, as defense counsel noted below, appellant had "been called before the jury through [the prosecutor's] errors a pornographer...." (1197).

Appellant's alleged involvement in a plan to distribute pornographic cassettes was totally irrelevant to the charges for which appellant was being tried -- conspiring to defraud the SBA and filing a false application -- and the prosecutor conceded as much. Moreover, the court not only found the dis-

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[55] The prosecutor claimed that he "didn't rehearse [Siviglia] too well if I am accused of that," and he did not "think that the benefit of what I would gain from that would be worth the risk of prejudicing the jury" (1196-1197), thereby acknowledging the prejudice to appellant resulting from the reference to pornographic cassettes.

[56] Somewhat confusingly, the court also stated, "I don't think [the reference to pornographic cassettes] is prejudicial either but it shouldn't have been brought out but I can't reprimand you as you didn't do it intentionally" (1197). Whether intentional or not, however, the effect on the jury was the same.

closure of appellant's involvement with pornographic cassettes "quite serious," but also "intentional."

While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935).

Here, the prosecutor's attempt to have the jurors believe that appellant was a pornographer was a similarly "foul" blow. Such a characterization could only have prejudiced appellant by jaundicing the jurors' view of him.[57] Few epithets engender as ready a feeling of disgust and contempt as that of "pornographer," and the manner in which the prosecutor elicited this reference[58] leaves little doubt that his purpose was to "sug-

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[57]The court's "feeling" that the pornographic cassette matter did not prejudice the jurors was based on the court's view of the evidence that appellant and Kirkman were present and met with Grosvalet when Grosvalet and his girlfriend, Sylvia Kristof, came to Kirkman's studio to do a "breathing" soundtrack for a pornographic film. Defense counsel, however, correctly pointed out that, based on the evidence, the studio belonged to Kirkman and that appellant had nothing to do with it (1198). Thus, prior to Siviglia's statement, there was nothing to connect appellant with the making or distribution of pornographic films.

[58]In support of the court's finding that the Siviglia statement was intentionally elicited, defense counsel stated:

> In the first place [the prosecutor] had a number of conversations with Mr. Siviglia and I saw this coming out. I continually objected. I sought to stop [the prosecutor] from continuing, but he knew and he started to talk about cassettes they were going into

gest that the defendant was a contemptible person...." United States v. Burgos, 304 F.2d 174, 179 (2d Cir. 1969).

Moreover, at appellant's request, no curative instructions were given by the court. It was appellant's position that any such instruction on the pornographic cassettes would only heighten the prejudice and, in any event, that no instruction could remedy the damage already done (1199-1200). As this Court itself has recognized:

> A judge's corrective statement will rarely completely cure that prejudicial damage created when improper information reaches the ears of the jury.
>
> United States v. Semonsohn, 421 F.2d 1206, 1208 (2d Cir. 1970).

Thus, the prejudicial effect of having the jury hear of appellant's involvement with pornography was not, and could not be, cured in any way. Accordingly, the prosecutor's misconduct in eliciting that information in the first place should result in a reversal of appellant's conviction.

(Footnote continued from the preceding page)

> the area of pornography and this area was fraught certainly with great sensitivity and the witness was going to say something about it.
>
> (1197).

C. The prosecutor's knowing use of Grosvalet's and Kristof's false testimony that appellant had prepared the handwritten duplicate SBA forms was reversible error.

Grosvalet, the Government's main witness, testified uncontradicted at the post-trial hearing that, during the pretrial interviews, he had told the prosecutor that he "did not know for sure who had prepared the [SBA] application" (H.210) and that he "hadn't actually seen anybody prepare the application" (H.212). Not only did the prosecutor refuse to turn over his notes of these interviews as proper "3500" material (see Point II-D, infra), but he permitted Grosvalet to testify unequivocally during trial, over repeated objections, that he had, in fact, seen appellant fill out various duplicate SBA forms. Moreover, even after learning during trial while Grosvalet was still on the witness stand that it was in fact Siviglia's handwriting which appeared on all the duplicate forms, the prosecutor continued to permit Grosvalet, and Kristof after him, to testify that they recognized appellant's handwriting on some of the forms and had seen appellant make them out. The prosecutor's knowing use of this false testimony, and his failure to bring it to the court's and counsel's attention, was grossly improper conduct, resulting in substantial prejudice to appellant. Not only did this tactic leave hanging in the case the inference that the handwriting was appellant's, but it was on the basis

of Grosvalet's false testimony that many documents were admitted into evidence and shown to the jury at a time when the prosecutor would otherwise have been unable to do so. Accordingly, appellant's motion for a mistrial based on this improper conduct should have been granted.

It is by now firmly established that the Government's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" (Giglio v. United States, 405 U.S. 150, 153 (1972)) and "[t]he same result obtains when the [Government], although not soliciting false evidence, allows it to go uncorrected when it appears." Napue v. Illinois, 360 U.S. 264, 269 (1959). See also Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935). Indeed, the failure to disclose such evidence may require a new trial "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Where, as with Grosvalet, the "reliability of a given witness may well be determinative of guilt or innocence," Napue v. Illinois, supra, 360 U.S. at 269, such error on the prosecutor's part is particularly prejudicial.

Despite Grosvalet's hearing testimony that he had earlier told the prosecutor that he had not seen anyone prepare his SBA application, and Kristof's post-trial affidavit to the same

effect.[59] Grosvalet asserted unequivocally, but falsely, during trial that he had not only seen appellant fill out duplicate SBA forms, but also recognized appellant's handwriting on the forms.

Questioned by the prosecutor, the following colloquy ensued:

> Q. Did you observe [appellant] doing anything?
>
> A. At that time he was in another office. When I completed the personal history I brought it in to him.
>
> * * *
>
> Q. Did you observe him doing anything?
>
> A. Yes, he copied from what I wrote on the bond paper onto one of those forms.
>
> Q. Which form?
>
> A. I believe it was -- first this form.
>
> Q. Read the tag.
>
> A. [Government Exhibit] 2A.
>
> Q. Did you observe any other forms?
>
> A. He wrote down on the personal history, [Government Exhibit] 3A.
>
> (202).

---

[59] Although Kristof did not testify at the hearing, her affidavit that "I heard [Grosvalet] tell Mr. Wilson that he did not know who had prepared his SBA application" was submitted in support of the post-trial motion (Document #12 to the record on appeal, Kristof's affidavit).

Later, on a voir dire by appellant's counsel concerning Government Exhibit #1A, the following responses were elicited:

> Q. Did you see Mr. Devins make that piece out [Government Exhibit #1A]?
>
> A. I saw Mr. Devins fill out a form.
>
> Q. Did you see him make that form out, 1A?
>
> A. Can I look at it again?
>
> (Handed to witness).
>
> A. Yes, I saw Mr. Devins fill out, one out [sic].

(231).

Again, on another voir dire by appellant's counsel concerning Government Exhibit #3A, the following exchange occurred:

> Q. Is it your testimony that the paper [Government Exhibit #3A] is in Mr. Devins' handwriting?
>
> A. Yes.
>
> Q. Did you see him write it?
>
> A. Yes.
>
> Q. Written in your presence? Who else was present?
>
> MR. WILSON: Objection.
>
> THE COURT: Yes, sustained.
>
> MR. COVEN: No further questions. I object to it, Your Honor.
>
> THE COURT: The objection is overruled, and it is taken subject to connection as far as the defendants Hill and King are concerned.

(246-247).

And again, with the prosecutor questioning on direct examination:

> Q. Mr. Grosvalet, did you state before that you saw Mr. Devins working on figures?
>
> A. Yes, sir.
>
> Q. I show you [Government Exhibits] 6A, 8A, and 9A, and ask you to examine those documents and ask you if you recognize them?
>
> MR. COVEN: I object, Your Honor, to this procedure and this type of question.
>
> THE COURT: No, I will permit it
>
> * * *
>
> [Question read]
>
> A. Yes, I do.
>
> Q. How do you recognize them?
>
> A. I saw those in Mr. Devins' office.
>
> Q. Did you see him working on any of these documents?
>
> A. I saw him working on one of these documents.
>
> Q. Do you recall which one?
>
> A. I believe it was the balance sheet ... [Government Exhibit] 8A.
>
> (287-288).

And yet again, when pressed on cross-examination by defense counsel as to Grosvalet's ability to identify Government Exhibit #2A, the following exchange was had:

> Q. I show you 2A, Exhibit 2A in evidence, Personal Financial Statement. Is it your testimony, as I understand it, that you recognized 2A to be Mr. Devins' handwriting, is that correct?

A. That is correct.

Q. ... Is it your testimony that you were present with Mr. Devins when that Personal Financial Statement was filled out?

A. It could be this one. I said I was with Mr. Devins when he filled out certain documents. What more can I possibly say? I recognize the document. I recognize Mr. Devins' handwriting.

(549).

On other occasions, Grosvalet claimed that "I recognized Mr. Devins' handwriting and that I did see Mr. Devins fill out certain forms" (546); that "to the best of my knowledge, yes [Government Exhibits #1A, #2A, and #3A are in appellant's handwriting] (547); and that appellant gave Grosvalet a copy of Government Exhibit #2A "in his own handwriting ... no question about that..." (553).[60]

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[60]The foregoing excerpts from the record amply refute the prosecutor's assertion in his post-trial affidavit that Grosvalet "did not unequivocally identify the worksheets as being in Devins' hand" (Document #14 to the record on appeal, p.2) and his false statement to the jury in summation that "at no time during his testimony did [Grosvalet] say, yes, this is the document I saw" (2120-2121). Quite the contrary, Grosvalet not only unequivocally identified appellant's handwriting on a number of occasions, but claimed to have seen appellant actually write out some of the duplicate forms. Indeed, it was on the basis of Grosvalet's certainty in identifying the documents that the court admitted them into evidence. Thus, for example, as to Government Exhibit #1A, the court admitted it into evidence because it found that Grosvalet had testified "this was Mr. Devins' handwriting and [Grosvalet] saw him do it and that's his testimony" (234). The same thing occurred with Government Exhibits #2A and #3A (239, 246, 247). Moreover, the court readily agreed with counsel's statement, when he later moved for a mistrial because of the prosecutor's use of false testimony, that:

[Continued next page]

Based on Grosvalet's unimpeached and uncontradicted hearing testimony that he had told the prosecutor prior to trial that he "hadn't actually seen anybody" prepare his SBA application, defense counsel turned out to be totally justified in asserting as to Grosvalet's testimony,

> The testimony given that it was Mr. Devins' signature, that Mr. Wilson had good reason to believe was false and perjurious, that he recognized the handwriting of this particular defendant.
>
> (305).

Yet the prosecutor still continued to insist that counsel's assertion was "frivilous" [sic] (305), in spite of the court's clear warning that

> [the prosecutor] owes not only a duty but an obligation rests upon the prosecutor not to permit any kind of perjured testimony or testimony that he knows to be false, whether perjured or not. to go before the jury without bringing it to the attention of everybody concerned.
>
> (302).

While the prosecutor may have had "good reason to believe" then that Grosvalet's testimony was false, if not perjurious,

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(Footnote continued from the preceding page)

> Mr. Grosvalet got on the stand and he said he saw Devins write Exhibit such and such and I watched him write it and this is his handwriting. He repeated that four times.
>
> THE COURT: Yes, he did.
>
> (1327).

by the evening of April 10 the prosecutor knew for a fact that Grosvalet's testimony was false, for it was then, according to Siviglia's undisputed hearing testimomy, that Siviglia was "being prepared to testify" by the prosecutor (H.351), and must have told the prosecutor that it was his handwriting, and not appellant's, which appeared on the duplicate SBA forms.

Nevertheless, on April 11, after "preparing" Siviglia and while Grosvalet was still on the witness stand under cross-examination,[61] the prosecutor permitted Grosvalet to respond in the following manner:

> Q. Do you recall testifying here on this trial and telling us that you personally watched Mr. Devins make up a balance sheet and you identified his handwriting? Do you recall that?
>
> A. I recall identifying the handwriting.
>
> Q. And didn't you tell us that you watched him while he did it?
>
> * * *
>
> A. I said I watched Mr. Devins make out various documents, one was possibly or could have been a balance sheet or projection sheet. All I recall is that there were figures on the sheet.
>
> Q. Didn't you identify that paper specifically as being Mr. Devins' handwriting?

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[61] The prosecutor's carefully drafted affidavit in opposition to the motion for a new trial acknowledges that he learned of Siviglia's role in preparing the duplicate forms "for the first time while preparing [Siviglia] to testify and after Grosvalet had testified to the contrary." Document #13 to the record on appeal, p.3. It is significant to note that he does not allege that he only learned of this fact after Grosvalet had been excused from the stand.

A. Yes.

Q. As a matter of fact, you identified three papers, is that right?

A. Yes.

(682).

Had the prosecutor brought to the court's attention the falseness of Grosvalet's testimony immediately after Grosvalet had testified, he at least would have gone a long way toward demonstrating his own good faith in not pursuing false testimony. However, not only did the prosecutor "allow it to go uncorrected when it appear[ed]" (Napue v. Illinois, supra), he deliberately continued to foster the impression that appellant had personally prepared the SBA documents.

Thus, on April 14 and 15, a good four days after learning from Siviglia that appellant had not prepared any of the forms himself, the prosecutor permitted Kristof, who had seen no more of appellant's activities than had Grosvalet, to state on direct examination,

> I did see Gerry make our forms for the balance sheets, the prospective balance sheets...

(996).

On her cross-examination, Kristof claimed she saw appellant "make out projection sheets, balance sheets" (1013), that she "saw [appellant] write out a financial statement" (1121), and was personally present with Grosvalet when they watched appellant do so:

> I remember he was using a working sheet and he was writing down the projection sheets,

balance sheets, and etc. and that is all
I can remember.

(1122).

However, when defense counsel sought to "nail...down" whether Kristof had seen appellant write out Government Exhibit #2A, something Grosvalet had testified to, the court sustained the prosecutor's objection that this question was beyond the scope of re-direct examination, and counsel was reluctantly forced to terminate (1123-1125). Thus, the prosecutor not only failed promptly to reveal the falsity of Grosvalet's testimony, but frustrated any possibility of defense counsel's doing so by an objection at a critical point.

It is true that the prosecutor finally brought out through Siviglia the falsity of Grosvalet's prior testimony -- that it was Siviglia's and not appellant's handwriting which appeared on the SBA duplicate forms.[62] It was this fact, combined with the testimony of the handwriting expert Heberer, which caused the court to conclude at the hearing that appellant had suffered no prejudice from the prosecutor's conduct:[63]

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[62]However, even in doing so, the prosecutor refused to acknowledge that Grosvalet's testimony was knowingly false. Instead, he resorted to the strategem of eliciting from Siviglia the fact that appellant had on occasion used a felt-tip pen like the one Siviglia used to prepare the duplicate forms (1273-1277). From this tenuous connection, the prosecutor argued to the jury that Grosvalet had honestly mistaken Siviglia's handwriting for appellant's (2134-2136). This ploy cannot negate the fact that Grosvalet had testified that he had actually seen appellant fill out some of the duplicate forms.

[63]Significantly, the hearing court made no finding of fact on the critical issue of whether the prosecutor had knowingly allowed Grosvalet to testify falsely.

> In connection with the affidavit of Sylvia Kristof and referring to the credibility and motives of Grosvelat [sic] with respect to the question of Devins' handwriting being on the application, I believe that the testimony of Mr. Grosvelat was to the effect that he thought it was the writing of Mr. Devins and that the testimony of the handwriting expert who did testify was that it was not Devins' handwriting, and the admission of Mr. Siviglia that it was in his handwriting forms the basis upon which to conclude that the jury was not misled and could not have been misled into believing this was Devins' handwriting on the application.
>
> (Appendix D at 24).

However, the court's conclusion that "the jury was not misled ... into believing this was Devins' handwriting on the application" loses sight of the fact that the court, in its charge, left the question of credibility of witnesses to the jury, and permitted the jurors to reconcile conflicting testimony (2204-2207). Thus, the jurors could have believed and found that it was appellant's handwriting on the duplicate SBA forms, despite the contrary and conflicting evidence. Moreover, the court's conclusion does not take into account the lingering impact of the initial false but devastating disclosure that appellant's handwriting appeared on the forms. Finally, and perhaps most importantly, the prosecutor was able to have the duplicate forms prematurely admitted into evidence and to have the jurors compare them with the simultaneously admitted forms ultimately submitted to the SBA.

Accordingly, there is an insufficient basis to conclude that the jurors were not misled or that appellant was not pre-

judiced by the prosecutor's pursuit of false testimony. Therefore, appellant's conviction should be reversed.

D. The prosecutor's notes of his interviews with Grosvalet were producible either under 18 U.S.C. §3500 or under Brady v. Maryland, and the failure to produce them denied appellant a fair trial.

At trial, Grosvalet testified that beginning in July 1974 he had met with the prosecutor on at least three occasions and discussed the events of the case for a period of several hours. During all these conversations, the prosecutor took notes.[64] Based on this testimony, the defense repeatedly demanded that the prosecutor produce those notes as proper "3500" material (422-425, 432, 461, 464, 1149-1150). The prosecutor refused to do so, claiming the notes were his "work product" and not "3500" material (424-425, 464, 1016). Moreover, the court refused to direct the prosecutor to turn over his notes, and

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[64] Kristof, too, confirmed that the prosecutor had taken notes of her interviews (1010-1016). Moreover, when asked on cross-examination,

> When you explained your knowledge of the situation to Mr. Wilson he took down notes. Did he repeat to you in essence what you said, what he took down, to see if he got it correctly?

she answered "yes" (1073).

failed to follow counsel's request that the court inspect the notes in camera (424-425, 463, 465, 1150).[65] The court was of the view that

> [n]otes of interviews by an assistant U.S. Attorney are not required to be turned over not even if the witness looked over the notes and adopted them as his own. Look at the [Meyerson] case, Mr. Coven.
>
> (463).[66]

Instead, the court directed the prosecutor to retain, seal, and make his notes part of the record in the event of an appeal.[67]

At the post-trial hearing, Grosvalet elaborated on the prosecutor's notes and the manner in which they were taken. The

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[65] That the court did not inspect the prosecutor's notes, as counsel requested, is demonstrated by the court's statements at the post-trial hearing. There, the court asked Grosvalet whether he had testified at trial substantially in accordance with the answers he had given the prosecutor (H.224), and later stated that as far as Grosvalet knew he gave the same answers on the witness stand as he gave to the prosecutor (H.226). Finally, in his decision on the motion, the judge stated:

> ... I don't believe under any stretch of the imagination as reported to me as to what was involved with Mr. Grosvalet's interview with Mr. Wilson -- I think only upon an extreme stretch of the imagination could that be deemed 3500 material.
>
> (H.24-25). Emphasis added.

These were statements the court was not likely to have made if it had examined the notes. In fact, the court never said it did examine them.

[66] United States v. Meyerson, 368 F.2d 393 (2d Cir. 1966).

[67] The prosecutor's interview notes have not been made part of the record on appeal as yet, and appellate counsel has never seen them.

notes, constituting "a dozen or better" pages (H.204),[68] were the result of the prosecutor's asking, and Grosvalet's answering, questions (H.199).

> Q. Did Mr. Wilson write out questions and then ask you the questions and then write out the answers that you gave to those questions?
>
> A. Yes.
>
> Q. And later showed you the written answers and ask you whether the answers that were written out were your answers?
>
> A. Yes.
>
> Q. Did you verify most of the answers?
>
> A. Yes.
>
> Q. With respect to those answers that you did not verify, did you have a discussion with Mr. Wilson about those answers?
>
> A. Yes.
>
> * * *
>
> Q. On occasion did Mr. Wilson change the written answer that he had written out after having a discussion with you?
>
> A. I know that he wrote things that were my own words; and in reading back the questions and answers, I had the same questions about some of the answers, and in discussing them, we came to a final answer that was usually, if not all the time, my answer; the way that I had known it to be.
>
> Q. In other words, your own words?
>
> A. Right.
>
> (H.202-204).

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[68]The prosecutor indicated that there were eighteen pages of notes of Grosvalet's interview (H.221).

Moreover, Grosvalet described the notes, which he had seen when the prosecutor gave them to prepare his testimony (H.220-221), in this way:

> There were some that were notations and there were some that were straight answers, you know, verbatim on some of them. They were kind of short, I believe. If the sentence was only a few words, then I think I believe he wrote them out verbatim. Otherwise, for the most part they were notes ... [of] actually what I did say to him.
>
> (H.224).

Although Grosvalet "believe[d]" that he had testified at trial in accordance with his answers in the notes (H.224), counsel nonetheless again requested that the court examine the notes in camera to determine whether this was true (H.226). Quite apparently, the court again failed to do so, and never actually looked at the prosecutor's notes.[69]

Title 18, U.S.C. §3500(e) defines a producible statement under the Jencks Act as

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; [or]
>
> (2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement.

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[69] See fn.65, supra, at 78.

As described by Grosvalet, the prosecutor's notes of the interviews with him were producible statements within either (e)(1) or (e)(2), or at least there was sufficient basis to believe they were such to require the court to examine the notes, pursuant to counsel's repeated request.

On March 30, 1976, the Supreme Court decided Jencks Act issues almost identical to the ones raised herein. Goldberg v. United States, ___ U.S. ___, 44 U.S.L.W. 4424 (March 30, 1976). In Goldberg, the Court held that

> ... a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been "signed or otherwise adopted or approved" by the Government witness is producible under [section (e)(1) of] the Jencks Act, and is not rendered nonproducible because a Government lawyer interviews the witness and writes the "statement."
>
> Id., 44 U.S.L.W. at 4425.

In so ruling, the Court rejected the Government's argument that such interview notes are non-producible "work product":

> We see nothing in the Jencks Act or its legislative history that excepts from production otherwise producible statements on the ground that they constitute "work product" of Government lawyers....
>
> We therefore conclude that the District Court erred in holding that the work product doctrine bars production of writings otherwise producible under the Jencks Act.
>
> Id., 44 U.S.L.W. at 4426-4428.

Here, the District Court committed the same error for, without expressly ruling on "work product" grounds, it appeared

nonetheless to do so when it concluded at trial that the prosecutor's interview notes are not producible "even if the witness looked over the notes and adopted them as his own." The Goldberg Court made it clear, however, that while "trial strategy or similar matter" could be excised from the prosecutor's notes, once a witness "adopted or approved" the notes, they had to be produced. 44 U.S.L.W. at 4428.

While Grosvalet's trial testimony did not make it clear whether he had "adopted or approved" the prosecutor's interview notes,[70] it at least provided "a sufficient question under the [Jencks] Act to require the trial judge to conduct such an inquiry...." Id., 44 U.S.L.W. at 4429. Here, far from conducting the kind of inquiry envisioned by Goldberg and earlier cases, (Id., 44 U.S.L.W. at 4428), the court failed to resort even to the easy expedient of examining the notes in camera as requested by the defense.

Grosvalet's testimony at the post-trial hearing, however, removed any doubt as to whether he had adopted or approved the notes. He testified that he not only "verified" the answers the prosecutor wrote to his questions, but after "discussing" the answers with the prosecutor, "we came to a final answer that was usually, if not all the time, my answer, the way I had known it to be ... [my] own words." This testimony can

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[70] Kristof's testimony made it clear that she at least had done so. See fn.64, supra, at 77.

only be interpreted to mean that Grosvalet "approved or adopted" the prosecutor's writing, and therefore the notes were producible within the meaning of 18 U.S.C. §3500(e)(1). Accordingly, the court erred when it concluded, once again without having actually examined the notes, that "I believe [the notes are] in the category substantially of notes of interviews taken by United States Attorney which are usually not considered 3500 material." (Appendix D, pp.25-26).[71]

Not only were the prosecutor's notes of Grosvalet's interview producible under 18 U.S.C. §3500(e)(1), but they were also producible under (e)(2). In United States v. McKeever, 271 F.2d 669, 675 (2d Cir. 1959), this Court stated, in discussing the scope of (e)(2):

> In every case, however, the statute must be interpreted with a mind to the fact that only a substantially verbatim, not precisely verbatim, recital of the witness' pretrial oral statement is required; ... Moreover, the statutory language should not be construed so narrowly as to lose sight of the congressional purposes -- to exclude the subjective impressions and opinions of the person making the report and to prevent the use of "statements to impeach a witness which could not fairly be said to be the witness' own."

Here, Grosvalet testified that not only were the answers he had given the prosecutor for the most part written down as "notes...[of] actually what I did say to him," but other answers

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[71] Because of the later inquiry at the post-trial hearing, there is no need to remand this case to the District Court, as was done in Goldberg.

of Grosvalet's were written down verbatim. Thus, the prosecutor's notes were not "subjective impressions and opinions of the person making the report," but more nearly a "substantially verbatim" recital which could "fairly be said to be the witness' own." Ibid.

Finally, the prosecutor's notes of Grosvalet's interview were not only producible under 18 U.S.C. §3500, but also should have been disclosed under Brady v. Maryland, 373 U.S. 93 (1963).[72] Grosvalet testified at the hearing that he had "quite possibl[y]" told the prosecutor during his interviews that appellant had advised him not to give any money to King or Hill until he had received the films from them. Since one of the crucial questions in the trial was whether appellant was acting legitimately on Grosvalet's behalf or instead was trying to dupe him with respect to the films, this statement by Grosvalet to the prosecutor would have been materially helpful to the defense.

Moreover, Grosvalet also remembered telling the prosecutor that he "did not know for sure" who had prepared the SBA application. In view of Grosvalet's testimony at trial indicating that appellant had personally prepared the application, this prior contradictory statement of Grosvalet's would also have been of material assistance to the defense.

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[72] This question was expressly left open in the Goldberg case. 44 U.S.L.W. at 4425, n.3.

In sum, the prosecutor's notes should have been produced as either "3500" or Brady material. Nevertheless, the District Court concluded:

> As I say, it probably was not 3500 material. If it was 3500 material there was no deliberate withholding of it from the defense and that the turning of it over to the defense would not have resulted in a different verdict from this jury nor could it have conceivably led to a different result from this jury.
>
> (Appendix D, p.26).

However, "[s]ince courts cannot 'speculate whether [Jencks Act material] could have been utilized effectively' at trial, the harmless error doctrine must be strictly applied in Jencks Act cases." Goldberg v. United States, supra, 44 U.S.L.W. at 4429, n.21. Here, the District Court's conclusion notwithstanding, it cannot be said with "fair assurance" that the jury's verdict was not "substantially swayed" by the error. Kotteakos v. United States, 328 U.S. 750, 765 (1946).

Accordingly, appellant's conviction should be reversed.

Point III

THE COURT'S REFUSAL TO COMPEL THE TESTIMONY OF THE CO-DEFENDANT KING WHO, AFTER PLEADING GUILTY AND BEING SEVERED FROM THE CASE, WAS SUBPOENAED AS A WITNESS BY APPELLANT, DEPRIVED APPELLANT OF DUE PROCESS.

On April 16, near the end of the second week of trial, the co-defendant King pleaded guilty to a superseding information (S 75 Cr. 394) charging him with the misdemeanor of failing to file a corporate tax return on behalf of NTP for the year ending June 30, 1974, in violation of 26 U.S.C. §7203. Accordingly, he was severed from the case (1374-1375). Thereafter, appellant subpoenaed him as a defense witness but, upon the representation of King's counsel that King would invoke a Fifth Amendment privilege because the instant indictment had not yet been dismissed as to him, the court made it clear that it would not compel King to testify (1667-1669). Counsel persisted and asked that King be compelled to testify concerning his failure to file the tax return, or at least for the court to instruct the jurors concerning the crime to which King had pleaded guilty, but these applications, too, were denied (1668-1669).

Consequently, there was lost to appellant important testimony which could have helped exculpate him. Since there was no legal justification for depriving appellant of King's material testimony, either because King had no Fifth Amendment privilege to assert or because he could have been granted immunity, appel-

lant's fundamental right to call witnesses to establish his defense was violated.

It is of course well settled that a criminal defendant has a constitutional right guaranteed by the Sixth Amendment to compel the attendance of witnesses and to offer their testimony in defense. Washington v. Texas, 388 U.S. 14, 19 (1967). This right has been recognized as necessary to give substance to a defendant's more general due process rights:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law.
>
> Id., 388 U.S. at 19.

In view of the importance of this right, this Court has said: "A defendant is entitled to every assistance which the court can give in compelling the attendance of witnesses and requiring them to give evidence, short of violating any rights they may properly claim under the Fifth Amendment." United States v. Sanchez, 459 F.2d 100, 103 (2d Cir.), cert. denied, 459 U.S. 864 (1972); see also United States v. Seeger, 180 F.Supp. 467, 468 (S.D.N.Y. 1960) (Weinfeld, J.) ("The defendant may not be deprived of the right to summon to his aid witnesses who it is believed may offer proof to negate the Government's evidence or

to support the defense"). Concededly, a defendant's Sixth Amendment right of compulsory process may give way to the Fifth Amendment right of a witness not to incriminate himself (Myers v. Frye, 401 F.2d 18, 20-21 (7th Cir. 1968); United States ex rel. Tatman v. Anderson, 391 F.Supp. 68, 71 (D.Del. 1975); Johnson v. Johnson, 375 F.Supp. 872, 875 (W.D.Mich. 1974)), but here, defendant King had no valid Fifth Amendment privilege to assert.

This Court and others have repeatedly recognized that a plea of guilty dissolves a witness' Fifth Amendment privilege as to his answers concerning the crime to which he pleaded guilty. McCarthy v. United States, 394 U.S. 459, 466 (1969); Reina v. United States, 364 U.S. 507, 513 (1960); United States v. Gloria, 494 F.2d 477, 480 (5th Cir. 1974); United States v. Sanchez, supra; United States v. Gernie, 252 F.2d 664, 670 (2d Cir.), cert. denied, 356 U.S. 968 (1958); United States v. Romero, 249 F.2d 371, 375 (2d Cir. 1957); United States v. Cioffi, 242 F.2d 473, 477 (2d Cir. 1957); cf. United States v. Sclafani, 487 F.2d 245, 250-252 (2d Cir.), cert. denied, 414 U.S. 1023 (1973).[73] King, it is true, did not actually plead guilty to

[73] In United States v. Wilson, 488 F.2d 1231, 1232-1233 (2d Cir.), reversed on other grounds, ___ U.S. ___ (1975), the Government argued precisely this contention. This Court, however, stated that the question of whether a plea of guilty completely puts an end to the privilege against self-incrimination "raises substantial issues." It is submitted that any reservations this Court may have as to whether the privilege terminates when a witness who has pleaded guilty is called by the Government should be allayed when the witness is instead called by a defendant asserting his Sixth Amendment right to

the charges in the indictment upon which both he and appellant were being tried; rather, he pleaded guilty to a misdemeanor contained in a superseding information.[74] Furthermore, the charges contained in the indictment were left open and were not actually nolle prosequed until August 26, 1975, long after appellant's trial was concluded. These facts, however, should not alter the conclusion that King's guilty plea and severance deprived him of a valid assertion of Fifth Amendment rights as to questions concerning the charges in the indictment or the charges to which he pleaded guilty.

King's plea of guilty was obviously the product of a plea bargain with the prosecutor in which the prosecutor agreed to dismiss the indictment in exchange for King's plea to the superseding misdemeanor information. In this circumstance, King could have no reasonable expectation of being prosecuted further on the charges contained in the indictment. Cf. Santobello v. New York, 404 U.S. 257 (1971). Nor was King open to prosecution in the State courts for the activities involved herein. Compare United States v. Dumenech, 476 F.2d 1229, 1231 (2d Cir.), cert. denied, 414 U.S. 840 (1973). Had the Government conditioned the acceptance of King's plea upon his commitment to refrain

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(Footnote continued from the preceding page)

compel the attendance of witnesses in defense, a right the Government does not have.

[74]The Government's nolle prosequi papers (Document #7 to the record on appeal) indicates that the misdemeanor to which King pleaded guilty arose out of the same transaction which formed the basis of his and appellant's original indictment.

from testifying on appellant's behalf at the risk of incriminating himself by any answers he might give if he did so, the prosecutor would have impermissibly impaired appellant's constitutional right to call witnesses in his defense. United States v. Bell, 506 F.2d 207, 222-223 (D.C. Cir. 1974); United States v. Domenech, supra. Thus, on these facts, King's claim of privilege was not justified,[75] particularly when balanced against appellant's fundamental right to call witnesses in his defense.

However, even if King could validly assert a Fifth Amendment privilege despite his plea of guilty, appellant was still entitled to his testimony under a grant of use immunity.[76] The right of a defendant to have his witnesses granted use immunity is both consistent with and required by his constitutional right to compel the attendance of witnesses and to offer their testimony. Note, A Re-examination of Defense Witness Immunity: A

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[75] In United States v. Wilson, supra, this Court found that "there is much to commend" the Government's contention that, even if a plea of guilty does not terminate the Fifth Amendment privilege, the claim was not justified because the witness was asserting his privilege out of loyalty to a friend rather than out of fear of incriminating himself. Similarly, here, where King had no reasonable expectation of being further prosecuted on the indictment, the assertion of his privilege was not justified.

[76] The fact that counsel did not actually request a grant of immunity should be of little significance since appellant "was entitled to every assistance which the court can give in compelling the attendance of witnesses and requiring them to give evidence" (United States v. Sanchez, supra), including directing the offer of immunity sua sponte, particularly where there is a substantial possibility that counsel had abandoned appellant's defense. See Point I, supra.

New Use for Kastigar, 10 Harvard Journal of Legislation 74 (1972).

The recognition of this right need not, of course, be absolute. One test which has been suggested for determining whether use immunity should be granted to defense witnesses is

> [w]hen the witness' testimony would be relevant and helpful to the defense of an accused or would be essential to a fair trial and when the interests of the witness and prosecutor can be adequately protected, the prosecutor should be required either to immunize the witness or to drop the prosecution.
>
> 10 Harvard Journal of Legislation, supra, at 80-81.

A trial court confronted with the option of directing the grant of such immunity would engage in a balancing of interests similar to the balancing process already followed in cases where the defense seeks to learn the identity of a Government informer. See, e.g., Roviaro v. United States, 353 U.S. 53 (1957).

In the instant case, the materiality and value of King's testimony to appellant's defense is clear. At a minimum, the facts surrounding King's guilty plea of failing to file a corporate tax return for NTP for the year ending June 1974 would have contradicted the Government's contention that NTP had not been in existence for much of the preceding year. Indeed, the nonexistence of NTP during 1973-1974 was central to Count Three of the indictment and, more generally, to the Government's entire theory of the case.

It is also apparent that if the protection afforded to

King was limited to use immunity, the interests of both the witness and the prosecutor would be fully protected. The Supreme Court, in Kastigar v. United States, 406 U.S. 441 (1972), held that the only valid interest of the witness -- that of protection against self-incrimination -- is fully satisfied by a grant of use immunity. Similarly, the only valid interest of the prosecutor -- that of preserving his option to prosecute the witness at some future date -- is not infringed upon by a grant of use immunity. As the Supreme Court recognized in Kastigar, supra, 406 U.S. at 453-459, a grant of use immunity leaves the witness and the Government in the same position as if the witness had claimed his privilege in the absence of a grant of immunity. See also 10 Harvard Journal of Legislation, supra, at 81.

Additional support for the conclusion that defense witness use immunity is an element of due process derives from the recognized principle that due process requires that a prosecutor disclose evidence in his possession which is favorable to a defendant. Brady v. Maryland, 373 U.S. 83 (1963). In the present case, the prosecutor, by not granting use immunity to King,[77] was in effect withholding evidence valuable to the defense.

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[77]Far from offering immunity to King, the prosecutor warned of further dangers concerning tax matters if King testified (1667).

For the reasons cited above, the Court should hold that the right of a defendant to have his witnesses granted use immunity is an element of due process and that the court below committed reversible error by failing to direct the prosecutor to grant this immunity to the witness King.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 1, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Richard A. Greenberg